TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. ~~605~~ 235.

THE UNITED STATES, APPELLANT,

vs.

GEORGE P. LIES & CO.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED SEPTEMBER 21, 1896.

CERTIORARI AND RETURN FILED OCTOBER 24, 1896.

(16355.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 606.

THE UNITED STATES, APPELLANT,

vs.

GEORGE P. LIES & CO.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

United States circuit court for the southern district of New York. In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the general appraisers, as to the rates and amount of duties on certain merchandise imported by them per S. S. "Rotterdam." Date of entry, June 30/90. Entry No. 104642, W. H. 12538.

To the honorable the circuit court of the United States for the southern district of New York:

Your petitioners, Geo. P. Lies & Co., being dissatisfied with a decision made on or about the 18th day of July, 1893, by the Board of General Appraisers designated by the Secretary of the Treasury, for and on duty at the port of New York, reviewing and affirming the decision of the collector of the port of New York as to the rate and amount of duty chargeable on certain merchandise imported at said port by your petitioners, as above specified, respectfully make application to the court and set forth herein the errors of law and fact complained of, to wit:

The said merchandise consists of a consignment, among other goods, of leaf tobacco. The same was classified and assessed by said collector for duty at the rate of 75 cents per pound. Your petitioners being dissatisfied with the said decision, gave notice to said collector accordingly within ten days after the ascertainment and liquidation of the duties as aforesaid, setting forth the reasons for their objection thereto, claiming the said merchandise to be dutiable at 35 cents per pound under Schedule F of the act of March 3, 1883, Heyl., 247.

Thereafter the said Board of General Appraisers, proceeding to hear and determine the questions of law and fact involved in said matters, affirmed the decision of the said collector in the premises.

And for the errors of law and fact in the decision of the said Board herein complained of your petitioners say:

First. That said Board of Appraisers erred as a matter of fact in finding that the returns of the local appraiser as to the character of said tobacco were correct.

Second. That said Board of Appraisers erred as matters of law:

(a) In affirming in any particular the collector's decision herein, so far as the same operated to impose a duty of seventy-five cents per pound on any of said tobacco.

(b) In holding that the returns of the local appraisers as to the character of said tobacco were correct.

(c) In holding that an examination of one bale in ten of a plantation lot is a lawful examination of said tobacco for the purpose of establishing the dutiable character of the same under Schedule F of the tariff act of March 3d, 1883.

(d) In holding that upon the examination made of said tobacco any portion thereof was dutiable at more than thirty-five cents per pound.

(e) In holding that upon the examination made of said tobacco any portion thereof, except the bales actually examined, was dutiable at more than thirty-five cents per pound.

(f) In holding that in the reliquidation of the entries of said tobacco the lots must be prorated according to the return of the local appraiser, "that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot to be dutiable at seventy-five cents, or thirty-five cents a pound shall be estimated according
8 to the proportion of the number of bales examined and returned by the appraiser as containing upwards of 85 % or less of wrapper tobacco."

(g) In failing to consider and decide upon their merits each and every of the clauses and allegations contained in your petitioners' protest.

Accordingly, your petitioners respectfully pray the court to order the said Board of General Appraisers to return to the court the record and evidence taken by the said Board, together with a certified statement of the facts involved in the above case, and of its decision thereon; and thereupon, and upon such further evidence as may be
9 hereafter taken pursuant to the statute in such cases made and provided, to proceed to review said decision, and to determine the questions of law and fact involved in same.

Dated New York, 189 .

GEO. P. LIES & CO.,
Petitioners.

By CURIE, SMITH & MACKIE,
Attorneys, 44 and 46 Exchange Place, New York City.

10 4 (Endorsed:) 1425. United States circuit court for the southern district of New York. In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the General Appraisers as to the rate and amount of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30/90. E. No. 104642 W. H. Petition. Curie, Smith & Mackie, attorneys for petitioners, 44 & 46 Exchange Place, New York City. U. S. circuit court. Filed Aug. 15, 1893. John A. Shields, clerk.

11 Know all men by these presents that I, Wm. H. Northup, am held and firmly bound unto the United States of America in the sum of fifty dollars, to be paid to the said United States of America, for the payment of which well and truly to be made I bind myself, my heirs, executors, and administrators jointly and severally firmly by these presents. Sealed with my seal and dated the 15th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

12 Whereas, Geo. P. Lies & Co. have applied to the circuit court of the United States for the southern district of New York for a review of the questions of law and fact involved in certain decisions of the Board of United States Appraisers made upon the entry of certain merchandise imported by them per S. S. "Rotterdam," June 30/90. E. No. 104642 W. H.

Now, therefore, the condition of this obligation is such that if the above-named Geo. P. Lies & Co. shall prosecute said proceeding with effect, and pay all damages and costs which shall be awarded against them therein if they shall fail to make said proceeding good,
13 5 then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

WM. H. NORTHUP. [SEAL.]

Sealed and delivered and taken and acknowledged this 15th day of Aug., 1893, before me.

[SEAL.] THOS. H. THOMPSON,
Notary Public, Kings County.

Certificate filed in New York Co.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Wm. H. Northup, being duly sworn, deposes and says that he does business in the southern district of New York, in the city of New 14
York; that he is worth the sum of one hundred dollars over and above all his just debts and liabilities.

WM. H. NORTHUP.

Sworn to before me this 15th day of Aug., 1893.

[SEAL.] THOS. H. THOMPSON,
Notary Public, Kings County.

Certificate filed in New York Co.

This bond is approved as to form and amount and sufficiency of surety.

Dated New York, Aug. 15, 1893. 15

E. H. LACOMBE.

(Endorsed:) 1425. United States circuit court for the southern district of New York. In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the General Appraisers, as to the rates, &c., of duties on certain leaf tobacco imported by them per S. S. "Rotterdam," June 30/90; E. No. 104642. Bond for costs on application for review. Curie, Smith & Mackie, attorneys for petitioners, 44 & 46 Exchange Place, New York City. U. S. circuit court. Filed Aug. 15, 1893. John A. Shields, clerk.

6 At a stated term of the United States circuit court for the 16
southern district of New York, held at the United States court and post-office building, in the city of New York, on the 15th day of Aug., 1893.

Present, Hon. E. Henry Lacombe, circuit judge.

In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the General Appraisers, as to the rates, &c., of 17
duties on certain leaf tobacco imported by them per S. S. "Rotterdam," Jun. 30/90; E. No. 104642 W. H.

Upon reading and filing the annexed petition of Geo. P. Lies & Co., importers of the merchandise therein described, and on motion of Curie, Smith & Mackie, attorneys for said petitioners,

It is ordered, that the Board of Appraisers at the port of New York return to this court the record and the evidence taken by them in each of the above-entitled matters, together with a certified statement of the facts in the case and their decision thereon. 18

E. H. LACOMBE.

(Endorsed:) 1425. United States circuit court for the southern district of New York. In the matter of the application of Geo. P.

Lies & Co. for a review of the decision of the General Appraisers, as to the rates, &c., of duties on certain leaf tobacco imported by them per S. S. "Rotterdam," June 30/90; E. No. 104642 W. H. Summons to return record. Curie, Smith & Mackie, attorneys for petitioners, 44 & 46 Exchange Place, New York City. U. S. circuit court. Filed Aug. 15, 1893. John A. Shields, clerk.

19 7 In the circuit court of the United States for the southern district of New York. In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the General Appraisers, as to the rates and amount of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30, 1890. Suit No. 1425. Return of the Board of United States General
20 Appraisers to the order of Hon. E. Henry Lacombe, circuit judge. Dated New York, September 13, 1893.

The Board of United States General Appraisers, sitting at New York, in response to the order of the court in the above matter, make the following return of the record and evidence taken by them in the above matter, and of the facts involved therein, as ascertained by them.

They state that on the 15th day of September, 1890, a letter dated
21 September 13, 1890, was received from the collector of customs at New York, a copy of which is returned herewith and marked Exhibit A, submitting under the provisions of section 14 of the act of June 30, 1890, the protest described and marked as follows: Exhibit B.

Coll's No.	Board No.	Protester.	Vessel.	Date of entry.
12538.	243—A.	Geo. P. Lies & Co.	Rotterdam.	June 30/90.

22 8 EXHIBIT A.

CUSTOM-HOUSE, NEW YORK CITY,
Collector's Office, Sept. 13, 1890.

To the Hon. Board of U. S. Gen'l Appraisers, New York.

GENTLEMEN: In pursuance of the requirements of sec. 14, act of June 10, 1890, I transmit herewith the protests, viz: 12,538, Geo. P. Lies & Co., from the assessment of duty by this office at the rate of 75 cents per pound on certain so-called "leaf tobacco," imported by them in the vessels named.

23 I have to state that the appraiser reported that a certain portion of the tobacco included in the above importations was of the requisite size, fineness of texture, etc., to be suitable for wrappers, and upon that portion only duty was assessed at the rate of 75c. per lb. under the provisions of T. I. new 246, S. 7350, 8299, & 8368.

The entries and invoices covered by the above protests are enclosed herewith.

The naval officer concurs in the decision of this office.

Respectfully, yours,

24 (Signed) J. J. COUCH,
Special Deputy Collector.

(28 Encl.)
Received Sept. 15, 1890.

EXHIBIT B.

NEW YORK, *Sept. 5, 1890.*

Hon. JOEL B. ERHARDT,
Collector of Customs, New York.

SIR: We hereby protest against your decision, assessment, liquidation, and exaction of duties as made by you on our importations below mentioned, of certain leaf tobacco, not stemmed, claiming said tobacco to be dutiable only at 35c. per pound, under the provision (247) of Schedule F, act March 3, 1883, and submit the following grounds separately, in support of our protest:

First. We protest against the estimate or determination of quantity of the different grades of said tobacco, as made by the appraiser or by yourself, and the assessment of 75 cents per pound as made by you, as unlawful and as not in accordance with the provisions of Schedule F of the act of March 3, 1883, claiming all of said tobacco to be dutiable under said provision at only 35 cents per pound, because eighty-five per cent of said leaf tobacco is not of the requisite size and of the necessary fineness to be suitable for wrappers and less than one hundred leaves are required to weigh a pound.

Second. That the standard grade of said tobacco, ascertained in accordance with commercial usage, is less than the limitation specified in Schedule F, act March 3, 1883 (par. 246), and is therefore dutiable at only 35 cents per pound, as provided under par. 247 of said schedule and act.

Third. We further protest against the classification of any of the leaves in any of the bales at 75 cents per pound which have not been examined, as illegal and contrary to law; a classification without examination; a pretended statement of facts the truth of which has not been ascertained by proper and legal examination.

Fourth. We further protest against the classification of any bale or portion of a bale at 75 cents per pound upon the partial examination of the bale only, as a classification without proper and legal examination.

Fifth. We further protest against the classification of any or all of the tobacco in bales not examined, at 75 cents per pound, upon the basis of the appraiser's return of those examined, as illegal and contrary to law and said schedule and act.

Sixth. That there is but one grade of said tobacco put up in the usual manner, and any attempt to separate the leaves as they exist in the hands for the purpose of making different grades of leaf tobacco, for purpose of classification, is illegal and contrary to law and the provision of Schedule F, act March 3, 1883.

Seventh. That any attempt to make such a separation without a bona fide examination and inspection of all leaves contained in the importation is illegal and unwarranted by law and said schedule and act.

Eighth. We protest against the storing of the bales ordered for examination in any artificially heated place, and the testing of said tobacco in such a dry and artificial condition as illegal and contrary to law and said schedule and act.

Ninth. We claim that in ascertaining the grade of said tobacco for purpose of classification, the hand should be taken as the unit of quantity, and that where less than eighty-five per cent of leaf in the hand is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred
31 11 leaves are required to weigh a pound, then such hand of tobacco is dutiable at only 35 cents per pound, as provided in Schedule F of act of March 3, 1883 (par. 247). Claiming said tobacco to be under said limit; or

Tenth. That in ascertaining the grade of said tobacco for purpose of classification, the bale should be taken as the unit of quantity, and where the bale does not contain eighty-five per cent of hands of the necessary fineness and lightness as aforesaid, then the whole bale is dutiable at only 35 cents per pound, under Schedule F, act March 3, 1883 (par. 247); or

32 Eleventh. That in ascertaining the grade of said tobacco for purpose of classification, the bale should be taken as the unit of quantity, and that where less than eighty-five per cent of the bale is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred leaves are required to weigh a pound, then such bale of tobacco is dutiable at only 35 cents per pound, as provided in Schedule F, act March 3, 1883 (par. 247). Claiming said tobacco to be under such limit; or

Twelfth. That in ascertaining the grade of said tobacco for purpose of classification, the invoice quantity should be taken as the unit of
33 quantity, and that where less than eighty-five per cent of the invoice quantity is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which less than one hundred leaves are required to weigh a pound, then such invoice quantity of tobacco is dutiable at only 35 cents per pound, as provided in Schedule F (par. 244) of act of 1883. Claiming such tobacco to be under said limit; or

Thirteenth. That in the absence of actual weight, ascertained in the legal manner, said tobacco is chargeable under Schedule
34 12 F, act March 3, 1883, at no more than 35 cents per pound, because less than eighty-five per cent of the U. S. weigher's return of said tobacco is not of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and that less than one hundred leaves are required to weigh a pound; or

Fourteenth. That if it be held that the hand is the legal unit of quantity, then if there is not eighty-five per cent of hands which contain eighty-five per cent of leaf of the requisite size, texture, and lightness as aforesaid in a bale, the whole bale is dutiable at no more than
35 35 cents per pound, and we claim said tobacco to be under such limit; or

Fifteenth. That if it be held that the bale is the legal unit of quantity, then if there is not eighty-five per cent of the bales in an invoice which contain eighty-five per cent of leaf of the requisite size, texture, and lightness as aforesaid, the whole invoice quantity is dutiable at no more than 35 cents per pound, and we claim said tobacco to be under said limit.

Sixteenth. We further claim that there has been no legal examination, appraisal, or classification of said tobacco; that the provisions of sections 2901 and 2939, U. S. Revised Statutes, have been com- 36
plied with.

Seventeenth. That the respective rates of duties have not been assessed upon weights legally ascertained, in that the provision of section 2980, U. S. R. S., has not been complied with; the duty of 75 cents per pound having been made upon an estimated weight made by the U. S. appraiser, instead of upon the actual quantity ascertained by the U. S. weighers, as provided by law.

Eighteenth. We further protest against the classification of
13 said tobacco without the opening and examination of the bales 37
designated and ordered to the public stores as illegal and not in conformity with the provisions of sec. 2901 and sec. 2939, U. S. R. S.

Nineteenth. We protest further that the examination of only ten hands of a bale instead of the whole of a bale designated and ordered for examination is not a compliance with the requirements of sec. 2901 and sec. 2939, U. S. R. S., and that the classification of said tobacco from such an examination is illegal and not made in accordance with law.

Twentieth. We protest further against the classification of any of said tobacco at 75 cents per pound upon the ground that there has 38
been no proper or legal examination to warrant such a classification and that the regulations of the Secretary of the Treasury with respect to the classification of said leaf tobacco has not been complied with.

Twenty-first. We claim that the method of determining the classification of said tobacco, as adopted by the appraiser or collector, is neither in compliance with the law nor with the existing regulations of the Secretary of the Treasury; that there has been no actual determination of the number of leaves of the higher grade by actual examination, assortment, and weighing of the different grades of 39
leaves in any given pound, hand, or any given number of hands, bale, lot, or invoice quantity, and therefore the assessment of 75 cents per pound on any of said leaf tobacco is illegal and done without sanction of law, there having been no legal ascertainment of grade or weight.

Twenty-second. We claim that the examination of the tobacco made by the examiner was not such an examination as was required
by sections 2901 and 2939 of the Revised Statutes and by
14 other provisions of law, nor conformably to the instructions of
the Secretary of the Treasury; that no sufficient examination 40
of the tobacco was made to ascertain whether 85 per cent was of the requisite size and fineness of texture to be suitable for wrappers, and whether more than one hundred leaves were required to weigh a pound.

Twenty-third. That the leaf tobacco in question, if found to be uniform in its putting up and packing, so as to constitute but one kind or line of tobacco, then if eighty-five per cent of it was not of the size and of the fineness and of the weight specified in paragraph 246, then the whole lot was dutiable at only 35 cents per pound under paragraph 247 of said schedule and act; and we claim it to be 41
of such uniformity and under such limitation.

Twenty-fourth. We therefore give notice that we pay all other higher rates than is claimed above as the legal rate, under compulsion and to obtain possession of our goods; and we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refund of the difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods, claiming that said duty is not the legal
42 duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty, and protesting against all illegal exactions of duty thereon, and hereby give notice that we intend this protest to apply to all future similar importations by us, and also intend the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury, under the rules of your office, to be an appeal to him from your decision and to likewise apply to all future similar importations by us.

43

15 Vessel.	From—	Date of entry.	Entry No.	If wareh'se, w. h. bond.	Liquidation.	Marks and numbers.
"Rotterdam".	Amsterdam.	June 30, 1890	104,642	37	Aug. 26, 1890	L. C. 101/192 193/410 and others, as per invoices and entry.

GEO. P. LIES & CO.

CHAS. CURIE,
Attorney, 44 and 46 Exchange Place, N. Y.,
For Geo. P. Lies & Co.

(Endorsed:) 245 A. 12538. Geo. P. Lies & Co. "Rotterdam." Tobacco. W. "Rotterdam," June 30/90; Liq. Aug. 26/90. Pro.
44 Sep. 5/90. Custom-house, New York, Sep. 5, 1890. Received.

That on the 18th day of July, 1893, the Board of General Appraisers rendered its decision in the matter of said protest No. 243–A, a copy of which is hereto annexed and marked Exhibit C.

EXHIBIT C.

(G. A. 2212.)

[Leaf tobacco under act of 1883—Unopened bales—Method of computing duty.]

45 Before the U. S. General Appraisers at New York, July 18, 1893. In the matter of the protests, 120 A–12349, etc., of Simon Auerbach & Co. and others against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain leaf tobacco, imported per the vessels and at the dates specified in the annexed schedule.

46 16 *Opinion by Wilkinson, General Appraiser.*

The merchandise is leaf tobacco, imported prior to October 1, 1890, and assessed for duty under the tariff act of March 3, 1883.

The protests embrace twenty-four clauses or objections, all of which, for the purposes of this decision, it is not deemed material to enumerate or consider.

The United States circuit court of appeals recently decided in the case of Blumlein, and we so hold in the cases now under consideration, that the bale is the unit, and that a bale of leaf tobacco of which 47
85 per cent is of the requisite size, fineness, and weight is dutiable at 75 cents, and when there is a less percentage at 35 cents, per pound.

A point which the court did not feel called upon to decide, but which is raised in the protests before us, and which is now raised by the appellants, is that no bales of tobacco other than those actually opened and examined by the appraiser and found to contain more than the requisite 85 per cent are liable to a higher rate of duty than 35 cents a pound.

We are of the opinion that an examination of one bale in ten, of plantation lots, is a fair and lawful examination of merchandise, and is in accordance with section 2901, Revised Statutes. While such 48
an examination might not furnish a precise description of the goods, there is no reason to suppose that it would not be as favorable to the importer as to the Government.

It is difficult, it is true, to decide just what bales are represented by the bales examined, inasmuch as the bales ordered to the public stores were not selected serially from decades.

In the absence of the merchandise and of any evidence to impugn the returns of the appraiser or to show the character of the tobacco, we find that the returns were correct, and, in accordance there-
17 with, we hold that in the reliquidation the lots must be pro- 49
rated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per cent or less of wrapper tobacco.

To this extent the protests are sustained. Otherwise the decisions of the collector are affirmed.

H. M. Somerville,
Charles H. Ham,
J. B. Wilkinson, Jr.,
Board of U. S. General Appraisers. 50

And for a certified statement of the facts involved in said matter, as ascertained by them, the said Board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said Board than such as are shown by said decision and other exhibits hereto attached.

H. M. Somerville,
Charles H. Ham,
J. B. Wilkinson, Jr., 51
Board of U. S. General Appraisers.

(Endorsed:) No. 1425. U. S. circuit court, southern district of New York. In the matter of the application of Geo. P. Lies & Co.

for a review of the decision of the General Appraisers, as to the rates and amount of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30, 1890. Return of record, evidence, and facts by Board of U. S. General Appraisers. U. S. circuit court. Filed Sep. 18, 1893. John A. Shields, clerk.

52 18 United States circuit court, southern district of New York. In the matter of the application of George P. Lies & Co., for review of the decision of the General Appraisers, as to the rates, &c.,
53 of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30/90; 104,642 W. H. No. 1425.

To the honorable the circuit court of the United States for the southern district of New York:

Your petitioners, George P. Lies & Co., respectfully represent:

First. That a return from the Board of United States General Appraisers in the above-entitled matter was filed in the office of the clerk of this court on the 18th day of September, 1893.

54 Second. That your petitioners desire to present further evidence in the above-entitled matter.

Wherefore your petitioners pray that an order be made referring said matter to one of the general appraisers to take and return to said court such further evidence as may be offered.

Dated Oct. 7th, 1893.

CURIE, SMITH & MACKIE,
Attys. for Petitioners.

55 19 Upon reading and filling the foregoing petition of George P. Lies & Co., and on motion of Charles Curie, attorney for said petitioners,

It is ordered, That the above-entitled matter be and the same hereby is referred to General Appraiser George H. Sharpe, to take and return to this court such further evidence as may be offered in said matter.

Dated, Oct. 7, 1893.

E. HENRY LACOMBE.

(Endorsed:) No. 1425. United States circuit court for the south-
56 ern district of New York. In the matter of the application of Geo. P Lies & Co., for a review of the decision of the general appraisers as to the rates, &c., of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30/90. Petition and order for further evidence. Curie, Smith & Mackie, attorneys for petitioners, 44 & 46 Exchange Place, New York City. U. S. circuit court.
57 Filed Oct. 7, 1893. John A. Shields, clerk.

58 20 United States circuit court, southern district of New York. In the matter of the application of Geo. P. Lies & Co., per "Rotterdam," June 30, 1890. No. 1425.

59 *To the circuit court of the United States for the southern district of New York:*

The undersigned, a General Appraiser under the act of June 10th, 1890, to whom it was referred by this honorable court by an order

made October 7, 1893, to take further evidence in the above-entitled matter, do hereby return such further evidence taken by me pursuant to such order.

Dated, New York, Dec. 7th, 1895.

GEORGE H. SHARPE,
United States General Appraiser, as an Officer of the Court. 60

21 United States circuit court, southern district of New York. 61
In the matter of the application of Geo. P. Lies & Co. for a review of the decision of the Board of U. S. General Appraisers as to certain importations per "Rotterdam," June 30, 1890. No. 1425.

Testimony taken before Hon. George H. Sharpe, as an officer of the court, in the above-entitled matter, pursuant to an order of reference made by said court, dated October 7, 1893. 62

NEW YORK, *March 27th, 1895.*

Appearances:

For the importers: Curie, Smith & Mackie. (D. I. Mackie, of counsel.)

For the collector and Government: James T. Van Rensselaer, asst. U. S. attorney.

Mr. MACKIE. I offer in evidence the entry in this case by the "Rotterdam," June 30, 1890, entry No. 104642, and the invoice and other papers accompanying the same or thereto attached, with the exception of the protest. 63

Importers rest.

Adjourned without fixing date for further hearing.

Testimony closed.

(Endorsed:) United States circuit court, southern district of New York. In the matter of certain merchandise imported by Geo. P. Lies & Co., per "Rotterdam," June 30, 1890. No. 1425. Testimony. U. S. circuit court. Filed Dec. 7, 1895. John A. Shields, clerk.

22 U. S. circuit court, southern district of New York. In the 64
matter of the application of George P. Lies, constituting the firm of George P. Lies & Company, for a review of the decision of the General Appraisers, as to the rates and amount of duties 65
on certain merchandise imported by them per S. S. "Rotterdam," June 30th, 1890. 1425.

SIRS: Please take notice that on the proceedings herein, a motion will be made before Hon. Hoyt H. Wheeler, U. S. judge, at the United States court room, in the city of Brooklyn, Kings County, N. Y., in this circuit, on the 15th day of January, 1896, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, to vacate and set aside the judgment entered herein on the 19th day of December, 66
1895, and to resettle the same, and to substitute therefor, as of that

date, the form of said judgment order as hereto annexed, a copy of which is herewith served.

Yours, &c.,

WALLACE MACFARLANE,
U. S. Attorney, Attorney for United States.

To Messrs. CURIE, SMITH & MACKIE,
Attorneys for Importers, 44 Exchange Place, N. Y. City.

67 23 At a stated term of the United States circuit court for the southern district of New York, held at the U. S. circuit court rooms, at the Post-Office building, in the city of New York, on the 19th day of December, 1895.

Present, Hon. Hoyt H. Wheeler, judge.

68 In the matter of the application of George P. Lies, et al., constituting the firm of George P. Lies & Company, for a review of the decision of the General Appraisers as to the rates and amount of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30th, 1890.—1425.

The above cause coming on for hearing and determination before this court, on the application of George P. Lies, et al., composing the
69 firm of George P. Lies & Co., importers, for a review of the questions of law and of fact involved in the decision of the Board of General Appraisers herein, and on the return of the Board of General Appraisers of the record and evidence taken by them, with their certified statement of the facts involved therein, together with their decision thereon, no petition for review of such decision of the Board of General Appraisers having been applied for by the collector or Secretary of the Treasury;

And the said George P. Lies & Company having conceded
70 24 in open court that there was no error in said decision of the Board of General Appraisers, and it having been contended on behalf of the collector and Secretary of the Treasury that the said decision of the Board of General Appraisers should be reversed for manifest error therein;

And the court having ruled that the collector and Secretary of the Treasury, or either of them, could not be allowed to impeach or in any way object to the said decision of the Board of General Appraisers, because they had not proceeded under the statute to seek a review of such decision of the said Board of General Appraisers;

Now, after hearing W. Wickham Smith, of counsel for said import-
71 ers, in support of the decision of said Appraisers, and Wallace Macfarlane, U. S. Attorney, in opposition thereto,

It is ordered, adjudged, and decreed that the decision of the Board of General Appraisers be and the same is hereby in all things affirmed.

(Signed) HOYT H. WHEELER.

It is hereby ordered that the foregoing judgment be substituted in the place of the judgment heretofore entered on December 20th, 1895,

and be filed as of that date, and that thereupon said previous judgment be vacated and set aside.

Jan. 15, 1896.

(Signed) HOYT H. WHEELER. 72

Consented to:

CURIE, SMITH & MACKIE,
Importers' Atty's.

(Endorsed:) "A," Suit No. 1425. U. S. circuit court for the second circuit. In the matter of the application of George P. Lies, constituting the firm of George P. Lies & Co., for a review of the decision of the General Appraisers as to the rates and amount
25 of duties on certain merchandise imported by them per S. S. "Rotterdam," June 30, 1890. Notice of motion and order. 73
(Judgment of affirmance.) Wallace Macfarlane, United States attorney, attorney for United States. Filed Decr. 20, 1895, as per order inside.

United States circuit court of appeals for the second circuit.

THE UNITED STATES, APPELLANT,
vs.
GEORGE P. LIES, ET AL., COMPOSING THE firm of George P. Lies & Co., appellees. } Suit No. 1425. 74

Assignment of errors.

The United States, appellant, hereby assigns error to the judgment of the circuit court of the United States for the southern district of New York, as follows: 75

First. In that it ordered, adjudged, and decreed that the decision of the Board of General Appraisers be in all things affirmed.

Second. In that it ruled that the collector and Secretary of the Treasury, or either of them, could not be allowed to impeach or in any way object to the decision of the Board of General Appraisers, because they had not proceeded under the statute to seek a review of such decision of the said Board of General Appraisers.

26 Third. In that it did not order, adjudge, and decree that all 76 of the tobacco classified for duty at the rate of seventy-five cents per pound by the collector, was lawfully so classified.

Fourth. In that it did not order, adjudge, and decree that the decision of said Board be reversed.

Dated, January 18, 1896.

WALLACE MACFARLANE,
United States Attorney, Attorney for Appellant.

(Endorsed:) "A," Suit No. 1425. U. S. circuit court of appeals for the second circuit. The United States, appellant, vs. George P. 77
Lies, et al., composing the firm of George P. Lies & Co., appellees. Assignment of errors. Wallace Macfarlane, United States attorney, attorney for collector. U. S. circuit court. Filed Jan. 18, 1896. John A. Shields, clerk. 78

79 27 United States circuit court, southern district of New York.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
GEORGE P. LIES ET AL., COMPOSING THE FIRM OF
80 George P. Lies & Co., appellees.

"A," Suit No. 1425.

Please take notice that the undersigned, on behalf of the collector of the port of New York and on the part of the United States, hereby appeals from the decision of this court rendered herein and entered on the 19th day of December, 1895, to the United States circuit court of appeals for the second circuit.

Dated New York, January 18th, 1896.

Yours, &c.,

WALLACE MACFARLANE,
81 *U. S. Attorney for the Southern District of N. Y.,*
Room 50, Post-Office Building, New York City.

To CURIE, SMITH & MACKIE, Esqrs.,
Attorneys for Importers, 46 Exchange Place, N. Y. City.

Appeal allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

82 28 (Endorsed:) "A," Suit No. 1425. U. S. circuit court, southern district of New York. The United States of America, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co. Notice of appeal. Wallace Macfarlane, U. S. attorney. To Curie, Smith & Mackie, esqrs., attorneys for appellees. Due service of a copy of the within notice of appeal is hereby admitted. Dated New York, Jan. 18, 1896. Curie, Smith & Mackie, attorneys
83 for appellants. U. S. circuit court. Filed Jan. 13, 1896. John A.
84 Shields, clerk.

85 29 United States circuit court of appeals for the second circuit.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
GEORGE P. LIES ET AL., COMPOSING THE
86 firm of Geo. P. Lies & Co., appellees.

"A," Suit No. 1425.

To the United States circuit court of appeals for the second circuit:

The Attorney-General of the United States hereby applies for the allowance of an appeal to the United States circuit court of appeals for the second circuit from the decision and judgment of the U. S. circuit court, rendered herein on the 19th day of December, 1895.

Dated January 18th, 1896.

87 JUDSON HARMON,
Attorney-General,
Per WALLACE MACFARLANE,
U. S. Attorney.

The foregoing application is granted and appeal allowed.
Dated New York, January 18th, 1896.

E. HENRY LACOMBE,
Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

30 (Endorsed:) "A," Suit No. 1425. U. S. circuit court of 88
appeals for the second circuit. The United States of America, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co. Application for and allowance of appeal. Wallace Macfarlane, U. S. attorney. To Curie, Smith & Mackie, esqs., attorneys for appellees. Due service of a copy of the within is hereby admitted. Dated New York, Jan. 18, 1896. Curie, Smith & Mackie, attorneys for appellees. U. S. circuit court. Filed Jan. 18, 1896. John A. Shields, clerk.

UNITED STATES OF AMERICA, *ss:*

To George P. Lies et al., composing the firm of George P. Lies & Co., 89
importers:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the second circuit, at the city of New York, on the 15th day of February, 1896, pursuant to an appeal on the part of the United States, filed in the clerk's office of the circuit court of the United States for the southern district of New York, in a certain suit or proceeding, entitled "The United States of America, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co., appellees," to show cause, if any there be, why the decision of the U. S. circuit court, in the said appeal mentioned, 90
should not be reversed, modified, or corrected, and speedy justice should not be done in that behalf.

Given under my hand, at the city of New York, in the southern district of New York, on the 18th day of January, 1896.

E. HENRY LACOMBE,
Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

WALLACE MACFARLANE,
U. S. Attorney, on behalf of the United States, Appellant.

31 (Endorsed:) "A," suit No. 1425. U. S. circuit court of 91
appeals for the second circuit. The United States of America, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co. Citation. Wallace Macfarlane, U. S. attorney. To Curie, Smith & Mackie, attorneys for appellees. Due service of a copy of the within citation is hereby admitted. Dated, New York, Jan. 18, 1896. Curie, Smith & Mackie, attorneys for appellees. U. S. circuit court, filed Jan. 18, 1896. John A. Shields, clerk.

UNITED STATES OF AMERICA, 92
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to twenty-seven, inclusive, contain a true and complete transcript of

the record and proceedings had in said court in the case of the United States, appellant, against George P. Lies & Co., appellees, as the same remain of record and on file in my office.

93 In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 13th day of February, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the said United States the one hundred and twentieth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

97 32, 33 United States circuit court of appeals for the second circuit.

THE UNITED STATES, APPELLANT,
vs.
GEORGE P. LIES ET AL., COMPOSING THE
98 firm of George P. Lies & Co., appellees. } Suit No. "A," 1425.

Stipulation.

It is hereby stipulated by and between the United States attorney for the southern district of New York in behalf of the United States, appellant, and the attorneys for the importers above mentioned, appellees, as follows:

Whereas none of the exhibits offered in evidence in this case in the circuit court below have been returned by the clerk of said court as part of the transcript of the record in this case, this present
99 stipulation shall be in lieu of such exhibits and shall be printed by the clerk of this circuit court of appeals as an addition to and as part of the printed record herein. The entry for warehouse of the merchandise in question bears date June 30, 1890, and covers two lots of Sumatra leaf tobacco not stemmed: One lot marked L. & Co., Nos. 101/192, ninety-two bales, and the other lot the same marks, Nos. 193/410, two hundred and eighteen bales, making an aggregate of 310 bales. Attached to said entry is the official weigher's special return of the merchandise, duly made by J. Jardine,
100 34 United States weigher, dated July 19, 1890, giving the gross weight of the tobacco, the actual and schedule tare, and the net weight of the tobacco; and on the back of said weigher's return appears a further return, showing the weight and tare of each and every one of the 310 bales of tobacco involved.

The invoice in evidence of the merchandise is in the German language, and is dated at Amsterdam, June 13, 1890, and is to Messrs. George P. Lies & Co., of New York, covering 310 bales of Sumatra tobacco, by the marks and numbers as stated in the foregoing entry, the gross weight and the tare being given in kilograms. This invoice was duly certified before the United States consul at Amster-
101 dam, and upon the face of the invoice appears the return in red ink, of the United States examiner at the port of New York: "Leaf tobacco, not stemmed, 35c. and 75c. Pars. 246 and 247, T. I. new." And on the back of said invoice appears in red ink the numbers of the bales of tobacco examined by the appraiser, with the note,

"Thirty-nine bales, as noted as per memo. attached, balance classified. July 19/90. C. H. R. D. F. Burke." And underneath, in blue ink, "Approved, M. W. Cooper, appraiser." Attached to the invoice appears the following table of returns made by Mr. Charles H. Roberts, U. S. examiner, of the bales ordered to the public store by the collector for examination and the percentages of each examined bale returned by the appraiser as dutiable at 35 cents and at 75 cents per pound respectively, which list is as follows: 102

35 Lots.	Plantation length & color marks.	Bales ordered for examination.	Percentage. 35c.	75c.	103
L & C 101/5	B B 1	105	80	20	
106/13	V 1	106		100	
114/16	G 1	116	70	30	
117/22	S 1	117	60	40	
123/52	S L 1	123	20	80	
	"	133	60	40	
	"	143	60	40	
153/63	S S 1	153	100		
	"	163	90	10	
164/92	S S L 1	164	30	70	
	"	174	10	90	
	"	184	60	40	
193/224	B B 1	193	100		104
	"	203	100		
	"	213	90	10	
	"	224	90	10	
225/27	L 1	225		100	
228/49	"	228	60	40	
	"	238	70	30	
228/49	V 1	249	40	60	
250/54	G 1	250	50	50	
255/62	K 1	262	20	80	
263/84	S 1	263	100		
	"	273	90	10	
	"	284	100		
285/337	S L 1	285	90	10	
	"	295	30	70	
	"	305	60	40	
	"	325	60	40	105
	"	337	60	40	
338/59	S S 1	338	100		
	"	348	90	10	
	"	359	70	30	
360/410	S S I 1	360	80	20	
	"	370	60	40	
	"	380	20	80	
	"	390	90	10	
	"	400	80	20	
	"	410	60	40	

July 19/90. C. H. R.

36 The tobacco was of uniform grade, and the examination of the representative bales by the Government officer was made by drawing not less than ten "hands" from each bale, the hand consisting of a certain quantity of leaves tied together by the stems. The collector classified the tobacco according to the percentages returned by the appraiser, dividing the examined bale and the lot represented by such bale into corresponding percentages of 75c. and 35c. tobacco. 106

CURIE, SMITH & MACKIE,
Attorneys for Importers.

WALLACE MACFARLANE,
U. S. Attorney, for the United States. 107

37 United States circuit court of appeals for the second circuit. No. 170. October term, 1895. Submitted April 23, 1896. Decided May 12, 1896. Appeal from the circuit court of the United States for the southern district of New York.

THE UNITED STATES, APPELLANT,
vs.
GEORGE P. LIES & CO., APPELLEES.

Before Judges WALLACE, LACOMBE, and SHIPMAN.

This is an appeal from a decision of the circuit court, southern district of New York, affirming a decision of the Board of General Appraisers.

LACOMBE, circuit judge. A certain importation of leaf tobacco was classified for duty by the collector at the port of New York, certain portions at 75 cents per pound, and certain other portions at 35 cents per pound. The importers being dissatisfied with such decision did within the proper time, in compliance with the provisions of sec. 14 of the customs administrative act of June 10, 1890, "give notice in writing to the collector, setting forth therein distinctly and specifically * * the reasons for their objections thereto." The collector thereupon transmitted the invoice and all the papers and exhibits connected therewith to the Board of General Appraisers. That Board in one particular sustained the protest of the importers, and in all other particulars affirmed the decisions of the collector.

38 Being dissatisfied with the decision of the Board, the importers applied to the circuit court for a review of the questions of law and fact involved in such decision, and filed, as the fifteenth section of the above-cited act requires, "a concise statement of the errors of law and fact complained of." Before the case was reached for hearing in the circuit court a decision of the Supreme Court was reported which satisfied the importers that they had no chance of success. Therefore, when the case was called, they conceded in open court that there was no error in the decision of the Board of General Appraisers, and the court adjudged that "the decision of the Board of General Appraisers be and the same is hereby in all things affirmed." The district attorney, on behalf of the United States insisted in the circuit court that that court should review the decision of the Board so far as it was favorable to the importers. This the court refused to do and the United States has appealed from such decision.

The circuit court was clearly right. Section 14 provides that the decision of the Board of General Appraisers "shall be final and conclusive upon all persons interested, and the record shall be transmitted to the proper collector * * who shall liquidate the entry accordingly, except in cases where an application shall be filed in the circuit court within the time and manner provided for in section fifteen of this act." Section 15 provides that "if the owner, importer, consignee, or agent of imported merchandise, or the collector, or the Secretary of the Treasury shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the

rate of duty imposed thereon under such classification, they, or either of them, may, within thirty days next after such decision, and not afterwards, apply to the circuit court * * * for a review of the questions of law and fact involved in such decison. Such application shall be made by filing in the office of the clerk of said circuit court a con-
39 cise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector or on the importer, owner, consignee, or agent, as the case may be."

The elaborate argument submitted upon the question whether or not the Board of General Appraisers is a court, and whether Congress had power, under the Constitution, to clothe it with judicial powers is irrelevant. Congress has expressly provided, as it had the undoubted right to do, that the decision of the collector as to rate and amount of duties on imported merchandise shall be final and conclusive, unless these questions are brought before the Board of General Appraisers in the manner provided in the act; and that the decision of the Board shall be final and conclusive, except when application for a review is made to the circuit court in the manner provided in the act. Names are nothing; it is immaterial whether this is called an appeal, or a review, or a transmission of the case; any person who is dissatisfied with a decision of the Board must set forth his grounds of dissatisfaction and file the same in the circuit court, and may apply to that court for a review "within thirty days next after such decision, and not afterwards." If he fail to apply for a review within the time limited his remedy in the circuit court is lost. The case at bar is clearly distinguishable from Grisar v. McDowell (6 Wallace, 363), for in that case, as it is stated on p. 367, "a transcript of the proceedings and decision of the board [of land commissioners] was filed in the district court, this operating under the statute of August 31, 1852, as an appeal by the party against whom the decision was given." The customs administrative act of 1890 contains no such clause, nor anything like it.

The decision of the circuit court is affirmed.

Henry C. Platt, assistant United States attorney, for the appellant; William Wickham Smith, for the appellees.

40 At a stated term of the U. S. circuit court of appeals for the second circuit, held at the U. S. post-office and court-house building, in the city of New York, on the 27th day of May, 1896.

Present, the Hon. Wm. J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, judges.

THE UNITED STATES, APPELLANT, *vs.* GEORGE P. LIES ET AL., COMPOSING THE FIRM OF George P. Lies & Co., appellees.	Suit "A," ≠1425.

An appeal having been duly taken in this court from a judgment of the circuit court of the United States for the southern district of New York, entered December 19th, 1895, and said appeal coming on to be heard;

Now, after hearing Henry C. Platt, esq., assistant U. S. attorney, of counsel for appellant, for reversal, and W. Wickham Smith, esq., of counsel for appellees, for affirmance, and due deliberation having been had,

On motion of Curie, Smith & Mackie, attorneys for appellees,

It is ordered, adjudged, and decreed that the judgment of the said circuit court of the United States for the southern district of New York be, and the same hereby is, in all things affirmed; and it is further ordered that a mandate issue to the said circuit court directing that court to make and enter a judgment herein affirming the decision of the Board of General Appraisers in this case.

W. J. W.

N. S.

Consented to as to form.

WALLACE MACFARLANE,
U. S. Atty.

41 (Endorsed:) "A," 1425. U. S. circuit court of appeals, second circuit. The United States, appellant, vs. George P. Lies et al., composing the firm of George P. Lies & Co., appellees. Order for mandate. Curie, Smith & Mackie, attys. for importers, 46 Exchange Place, N. Y. City. United States circuit court of appeals, second circuit. Filed May 27, 1896. James C. Reed, clerk.

42 UNITED STATES OF AMERICA,
Southern district of New York, ss:

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from one to forty-one, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of the United States, appellant, vs. George P. Lies & Co., appellees, suit No. 1425, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eighteenth day of June, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the said United States the one hundred and twentieth.

[SEAL.] JAMES C REED, *Clerk.*

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States circuit court of appeals for the second circuit, greeting:

Being informed that there is now pending before you a suit in which the United States is appellant and George P. Lies & Company are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the

44 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

45 (Indorsed:) Supreme Court of the United States, No. 606, October term, 1896. The United States vs. George P. Lies & Co. Writ of certiorari.

46 In the Supreme Court of the United States, October term, 1896.

THE UNITED STATES, APPELLANT,
vs.
GEORGE P. LIES & CO. } No. 606.

STIPULATION.

It is hereby stipulated between counsel for the parties to the above-entitled cause that the certified copy of the record of the cause in the circuit court of appeals for the second circuit now on file in the Supreme Court of the United States may be treated as the return to the writ of certiorari issued herein.

HOLMES CONRAD,
Solicitor-General.
W. WICKHAM SMITH,
Counsel for Respondent.

A copy:
[SEAL.] JAMES C. REED, *Clerk.*

47 *To the honorable the Supreme Court of the United States:*

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, October 23, 1896.

[SEAL.] JAMES C. REED,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

48 (Indorsed:) Case No., 16385. Supreme Court U. S. October term, 1896. Term No., 606. The United States, applt., vs. Geo. P. Lies & Co. Writ of certiorari and return. Filed Oct. 26, 1896.

PETITION FOR A WRIT OF CERTIORARI

No. 935

Brief of Atty. Gen. (Supplemental) with

for Appt. (Supplemental)

Filed Sept. 21, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIKE & CO., APPELLEES. } 606

APPLICATION AND MOTION FOR LEAVE TO SUBMIT ADDITIONAL BRIEF IN SUPPORT OF THE CLAIM OF APPEAL AND FOR ADVANCEMENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIES & CO., APPELLEES.

APPLICATION FOR WRIT.

On behalf of the United States, the Solicitor General respectfully prays for a writ of certiorari to be required to be certified to this court for review and determination, pursuant to the provisions of § 6 of the act entitled "An act to establish Circuit Courts of Appeals," etc., approved March 3, 1891, the cause originally entitled "In the matter of the application of Geo. P. Lies & Co., for a review of the decision of the General Appraisers as to the rates and amount of duties on certain merchandise imported by them per S. S. 'Rotterdam,' June 30th, 1890."

As I am informed by the Secretary of the Treasury, this case is one of 27 similar cases now pending in the United States Circuit Court for the Southern District of New York, involving an aggregate refund of more than $691,000.

Besides this large amount directly involved, the case is regarded as of great importance as establishing the procedure under the Customs Administrative Act upon review of decisions of the Board of General Appraisers.

Annexed hereto is a brief setting forth the questions arising upon this application and the authorities bearing thereon.

A certified copy of the entire record in the case in the Circuit Court of Appeals, including its opinion, is filed as part of this application.

HOLMES CONRAD,
Solicitor General.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIES & CO., APPELLEES.

BRIEF FOR APPELLANT ON APPLICATION FOR WRIT.

This case, the amount involved in which is very large, is a part of the well-known Sumatra leaf tobacco controversy. The merits of the question, however, were not considered in the court below. The point decided in that court was *quasi*-jurisdictional in character. The importers had filed in the United States Circuit Court an application for review of a certain decision of the Board of General Appraisers. The United States had filed no such application. When the decision came up to be reviewed, the United States attempted to show errors unfavorable to its own interests. The Circuit Court held that these errors had been waived by failure to file an application. This decision was affirmed by the Circuit

Court of Appeals; and, believing it to be erroneous, the present application for a writ of *certiorari* is made.

The merits of the case, as already stated, were not considered either by the Circuit Court or by the Circuit Court of Appeals. They are, as we shall show, already settled in favor of the Government's contention, by a decision of this court; so that, had the *quasi*-jurisdictional question not been raised, the decision of the Board of General Appraisers would necessarily have been reversed.

The controversy arose under paragraphs 246 and 247 of Schedule F in the tariff act of March 3, 1883, ch. 121, which are as follows:

> Leaf tobacco, *of which* 85% is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, *and of which* more than 100 leaves are required to weigh a pound, if not stemmed, 75 cents per lb.
>
> All other tobacco in leaf, unmanufactured and not stemmed, 35 cents per lb.

Two questions arose under paragraph 246:

(1) What is this 85% a percentage of? What is the unit?

(2) Does this 85% apply to the weight of the leaves, or only to their size and fineness of texture?

These questions were considered in the cases of *United States* v. *Blumlein*, 14 U. S. App., 101, decided in 1893, and *Erhardt* v. *Schroeder*, 155 U. S., 124, decided in 1894.

The Government contention in these cases, upon the questions above stated, respectively, was as follows:

(1) The unit is the leaf. The paragraph describes a certain quality of tobacco leaf which contains less than 15% of surface too coarse for wrappers, and which is large enough to be used for that purpose after the coarse part is cut away. This contention was supported by references to the Congressional debates and by certain *dicta* in the case of *Falk* v. *Robertson*, 137 U. S., 225.

(2) The 85% does not apply to weight. The paragraph is to be construed as it reads, without any forced construction.

The Blumlein case overruled both these contentions, and held as follows:

(1) The unit is the bale.

(2) Notwithstanding the language of the paragraph, the 85% clause is to be read as referring to the weight as well as to the size and fineness.

The Erhardt case finally decided these two questions as follows:

(1) It held the bale to be the unit, to this extent sustaining the Blumlein case.

(2) It sustained the literal construction of the paragraph, to this extent overruling the Blumlein case. It held that the weight test as to each bale was the average weight of the leaves in that bale.

It is now settled, therefore, that the statute is to be read as follows:

> A bale of unstemmed leaf tobacco is dutiable at 75 cents per lb., if 85% of it is wrapper tobacco in

quality, and if the average weight of the leaves in the bale is 1/100 lb.

STATEMENT OF FACTS.

The peculiarities of the record in this case are easily accounted for, when the dates of the decisions above referred to are borne in mind.

These goods were imported before the decision in the Blumlein case. The Treasury Department were then following the Falk case as interpreted by it. Assuming the leaf to be the unit, and finding the tobacco often of mixed quality as to weight of leaf, the customs authorities first pursued the system of emptying the sample bale and giving it a complete examination. Some importers protested against this system as destroying the quality of the tobacco, and asked that the quality of the bale be tested by drawing samples therefrom. A bale of tobacco is made up of a large number of packages called "hands." The Treasury Department accordingly adopted the system of drawing ten "hands" from each sample bale. If all of these "hands" proved to be composed of 75 cent tobacco the whole bale was rated at that amount, and *vice versa*. If some only of the ten "hands" proved to be 75 cent tobacco, the bale was regarded as consisting part of the one kind and part of the other. Thus, if seven "hands" were found to contain 75 cent tobacco, the bale was rated as containing 70% of that variety and 30% of the other. (Syn. Dec., 6674, 7350, 8299, 8368.)

This course was followed in the present case, and the examiner's return is set forth at p. 35 of the record. The importers protested, and the protest, together with

the entries and invoices, was transmitted to the Board of General Appraisers in pursuance of the requirements of § 14 of the Customs Administrative Act (p. 8). An abstract of these papers is found at pp. 33–4. They throw no light upon the question of the average weight of the leaves in the bale. As was then customary, the examiner returned simply the general result of his examination of the ten "hands" in each sample bale, not stating whether the variations were in size, fineness, or weight of leaf. The importers stipulated, however, that the tobacco was of uniform grade, which apparently is intended to signify that the size and fineness of the leaves was uniform in all the bales examined. This is usually the fact, as in the *Blumlein Case*, 49 Fed. Rep., 228, 231, and *United States* v. *Rosenwald*, 35 U. S. App., 89, 93.

The Blumlein case was decided by the Circuit Court of Appeals April 18, 1893. There being no right of review by this court, the Treasury Department, on June 12, 1893, directed settlements to be made in accordance with that decision. (Syn. Dec., 14096.) Settlements of cases arising prior to the Customs Administrative Act thereupon commenced. The examiner's returns were taken as the basis. If the return contained the figures 100 or 90 in the last column (see record, p. 35), the whole bale was rated at 75 cents. Otherwise, it was all rated at 35 cents. It was entirely unnecessary to ascertain whether the variation in rating in the case of any sample bale was due to variation in size, fineness, or weight; for the Blumlein case held that weight, as well as size and fineness, was governed by the 85% rule.

On July 18, 1893, the Board of General Appraisers, likewise following the Blumlein case, rendered their decision upon these protests (pp. 15–17). This decision, so far as material, is as follows:

> That a bale of leaf tobacco, of which 85 % is of the requisite size, fineness, *and weight*, is dutiable at 75 cents, and when there is a less percentage, at 35 cents per pound. * * *
>
> That the returns were correct, and in accordance therewith we hold that in reliquidation the lots must be prorated according to such returns; that is to say, the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 % or less of wrapper tobacco.
>
> To this extent the protests are sustained. Otherwise the decisions of the collector are affirmed.

This decision overruled a large number of points which had been taken in the protests (pp. 9–14), and to this extent it is admittedly correct (pp. 23, 24), the importers' concession to this effect being based upon the case of *United States* v. *Rosenwald*, 35 U. S. App., 89.

Owing to the Blumlein decision, and to the then acquiescence of the Treasury Department in that decision, the Government filed no application for review within the thirty days allowed by the Customs Administrative Act for that purpose. Such an application was, however, filed by the importers August 15, 1893 (pp. 1–4), in which they prayed the court as follows (p. 3):

> Your petitioners respectfully pray the court to order the said Board of General Appraisers to return

> to the court the record and evidence taken by the said Board, together with a certified statement of the facts involved in the above cause, and of its decision thereon; and thereupon, and upon such further evidence as may be hereafter taken pursuant to the statute in such cases made and provided, to proceed to review said decision and to determine the questions of law and fact involved in the same.

Within a few months thereafter the Treasury Department, being informed that the questions decided in the Blumlein case were about to come before this court in the Erhardt case before referred to, suspended settlements. The Erhardt case was argued January 24, 1894, and decided November 12, 1894. The Blumlein case being thus overruled in one essential particular, settlements in accordance therewith definitely ceased; and the question arose which is now presented to this court, namely, whether a petition for review filed by one party only brings the whole case before the court so that either party may be heard to impugn the decision in any particular.

CUSTOMS ADMINISTRATIVE ACT.

The question turns upon § 15 of the Customs Administrative Act of June 10, 1890, ch. 407, which provides for the proceedings commonly, but incorrectly, called appeals, by which a partial review of the General Appraisers' decisions is obtained from the Circuit Courts of the United States.

This section provides that the party dissatisfied with the decision of the General Appraisers as to the classifi-

cation of imported merchandise (as distinguished from valuation)—

> May, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the District in which the matter arises, for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the Clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served [etc.]. * * * Thereupon the court shall order the Board of Appraisers to return to said Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before the said Appraisers shall be competent evidence before said Circuit Court.

After providing for the taking of further evidence upon the application of either party, the section proceeds as follows:

> And such further evidence, with the aforesaid returns, shall constitute the record upon which said circuit court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision respecting the classification of such merchandise and the rate of duty imposed thereon under such classification.

The remainder of the section is immaterial.

ARGUMENT.

I.

A proceeding in the United States circuit court is not an appeal.

It is not called an appeal in the statute. It is called an "application;" and the application is not allowed for the purpose merely of reviewing "the errors of law and fact complained of," although a "concise statement" of these errors is required from the applicant; but it must be made broadly "for review of the questions of law and fact involved in such decision." The Circuit Court must treat the application as such, and "proceed to hear and determine the questions of law and fact involved in such decision, involving the classification," etc. The application for review in the present case conforms to the requirements of the statute, and asks that the court order the General Appraisers to return to it their decision in the case, and that the court "proceed to review said decision and determine the questions of law and fact involved in the same" (p. 3).

Even, however, had the word "appeal" been used instead of "application," the result would be nowise different. The present statute is drawn somewhat on the lines of the original "Act to ascertain and settle the private land claims in the State of California" of March 3, 1851, ch. 41. § 9 of that act (9 Stat., 632) provided that after a decision of the Board of Land Commissioners either party could "present a petition to the District Court of the District in which the land claimed is situated, praying the said court to review the decision of

the said Commissioners, and to decide on the validity of such claim." This section was repealed in the following year by the Civil and Diplomatic Appropriation Act of August 31, 1852, ch. 108, § 12 (10 Stat., 99). This latter act expressly termed the proceeding "an appeal," but this was held immaterial by the courts, as will be shown.

The cases coming from this California Board of Land Commissioners are the ones most nearly in point here. We therefore set forth the material portions of the two sections wherein the procedure was indicated:

> Act of 1852, § 12. * * * And in every case in which the Board of Commissioners on Private Land Claims in California shall render a final decision, it shall be their duty to have two certified transcripts prepared of their proceedings and decision, and of the papers and evidence on which the same are founded, one of which transcripts shall be filed with the clerk of the proper District Court, and the other shall be transmitted to the Attorney-General of the United States. And the filing of such transcript with the Clerk aforesaid shall *ipso facto* operate as *an appeal for the party against whom the decision shall be rendered;* and if such decision shall be against the private claimant, it shall be his duty to file a notice with the Clerk aforesaid, within six months thereafter, of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the Attorney-General, within six months after receiving said transcript, to cause a notice to be filed with the clerk aforesaid that the appeal will be prosecuted by the United States; *and on a failure of either party to file such notice with the clerk aforesaid, the appeal shall be regarded as dismissed.*

> Act of 1851, § 10. The District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court. * * *

In *United States* v. *Ritchie*, 17 How., 525, 533, it was held by this court that the section above quoted from the act of 1852 repealed § 9 of the act of 1851. An objection made to the constitutionality of the act was met by the court, speaking through Mr. Justice Nelson, as follows (pp. 533–4):

> It is also objected, that the law, prescribing an appeal to the district court from the decision of the board of commissioners, is unconstitutional; as this board, as organized, is not a court under the constitution, and can not, therefore, be invested with any of the judicial powers conferred upon the General Government. *American Ins. Co.* v. *Canter*, 1 Pet., 511; *Benner* v. *Porter*, 9 How., 235; *United States* v. *Ferreira*, 13 ibid., 40.
>
> But the answer to the objection is, that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere reexamination of the case as heard and decided by the board of commissioners, but hears the case *de novo*, upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce.

The applicability of these remarks to the statute under consideration in the case at bar will be seen at once.

II.

When one party files an application for review, it is unnecessary for the other party to file any answer, cross-notice, or other paper in order to give the court jurisdiction over the whole case.

No such paper is called for by the statute. That it is unnecessary is implied in the language of the statute. It is expressly provided that the court shall review not alone "the errors of law and fact complained of" by the applicant, but "the questions of law and fact involved in such decision." Nor is there any inherent necessity for an answer or cross-notice.

There is nothing new or anomalous about such a procedure. When one asks a court of chancery to open an account, and obtains an interlocutory decree to that end, even though the reopening is stoutly resisted by the defendant, a final decree against the complainant, and finding a balance in defendant's favor, is not impossible. (See 1 Story, Eq. Jur., § 522.) When several pleas are pleaded by defendant to a declaration or complaint, and one of these pleas is demurred to, the demurrant often can not obtain final judgment upon the hearing; yet the defendant may point out defects in the declaration or complaint, and himself obtain final judgment upon the demurrer, although he is not the moving party. (*Cooke* v. *Graham's Adm'r*, 3 Cr., 229–235; *Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 8 Wall., 276, 284.)

We have, however, a decision almost precisely in point in *Grisar* v. *McDowell*, 6 Wall., 363, decided by this court under the California acts above quoted, at December Term, 1867.

In this case plaintiff claimed title to certain land by conveyance from the City of San Francisco. Defendant, Gen. McDowell, claimed to hold it as an officer of the United States Government. The question of title turned upon a proceeding which had been conducted by the City of San Francisco before the Board of Land Commissioners to establish a Mexican grant. The commissioners decided partly in favor of San Francisco and partly in favor of the United States. Accordingly, by the act of 1852, above quoted, a transcript of such decision, filed with the clerk of the United States District Court, operated *ipso facto* as "an appeal" for both parties. Each party filed a notice of intention to prosecute the appeal. The Attorney General, however, by formal notice and stipulation, *dismissed the appeal of the United States.* It will thus be perceived that the case was much stronger against the United States than the present; and it was insisted upon the argument that the United States was debarred upon the subsequent hearing of the city's appeal from reasserting its own claims.

Mr. Justice Field, delivering the opinion of this court, discussed the question as follows (pp. 374–5):

> The appeal was by statute for the benefit of the party against whom the decision was rendered; in this case of both parties—of the United States, which contested the entire claim, and of the city, which asserted a claim to a greater quantity than that confirmed—and both parties gave notice of their

> intention to prosecute the appeal. Subsequently, in February, 1857, the Attorney-General withdrew the appeal on the part of the United States, and in March following the District Court, upon the stipulation of the district attorney, ordered that appeal to be dismissed, and gave leave to the city to proceed upon the decree of the board as upon a final decree. The counsel of the plaintiff contend that this decree closed the controversy between the city and the United States as to the lands to which the claim was confirmed. But in this view they are mistaken. Had the city accepted the leave granted, withdrawn her appeal, and proceeded under the decree as final, such result would have followed. But this course she declined to take. She continued the appeal for the residue of her claim to the four square leagues. *This kept open the whole issue with the United States.* The proceeding in the District Court, though called in the statute an appeal, was not in fact such. It was essentially an original suit, in which new evidence was given *and in which the entire case was open.*

After quoting from the opinion in *United States* v. *Ritchie*, *supra*, the learned justice proceeds as follows (pp. 375–6):

> The dismissal of the appeal on the part of the United States did not, therefore, preclude the Government from the introduction of new evidence in the District Court *or bind it to the terms of the original decree.*
>
> The authorities cited by counsel to show that when only one party appeals from a decree in a California land case, the other party can not urge objections to the decree or insist upon its modification, have no application. They are adjudications made in cases of appeal from the District Court to the

Supreme Court, where the case is heard on the record from the court below, and where error upon the record alleged by the appellant is alone considered, or in cases where an attempt has been made upon supplementary proceedings on a survey of the land confirmed to deviate from the terms of the original decree. It follows that, could the importers have obtained leave of court to withdraw their application for review, and withdrawn it accordingly, the United States might have been without remedy, but that, having brought the proceeding on for argument, they could not avoid having it fully argued on all points raised.

III.

Had the lower courts considered themselves empowered to pass upon the merits of this case, their decision could not have failed to be for the Government.

The decision of the Board of General Appraisers, which was based upon the Blumlein case, *supra*, can not be supported except upon the theory that that case is still authority upon both points decided. It is, however, clearly overruled by the Erhardt case, *supra*, upon the second point considered, namely, the construction and effect of the statutory provision as to weight of leaf. It had been conceded upon argument of the latter case that the collector's contention could not be sustained without overruling the former.

In the Blumlein case Judge Lacombe treated this question as follows (14 U. S. App., 109):

> The appellant further contends that the eighty-five per cent clause refers only to size and fineness. We do not so read the statute. Though

> awkwardly expressed, its evident meaning is that leaf tobacco, eighty-five per cent of which is of the requisite size, fineness, and weight, is dutiable at 75 cents per pound.

This court followed the plain language of the statute and treated the 85% clause, relating to the size and fineness, as entirely distinct from the clause relating to weight. It held the 85% clause to be applicable to the half-leaves, after the leaf is stemmed. It held the other clause to be applicable to the whole leaf, unstemmed. The interpretation is given in clear language by Mr. Justice Shiras (155 U. S., at p. 136):

> The most natural interpretation of the paragraph in question is to consider eighty-five per cent of half-leaves, or suitable half-leaves eighty-five in number out of half-leaves one hundred in number as the requirement, and to regard the proportion of the weight of the suitable half-leaves to the weight of all the leaves as immaterial.
>
> A further requirement of the act is that the leaves of the collection must be of such average lightness that more than one hundred are required to weigh a pound—that is to say, if the collection should weigh 160 pounds it must contain more than 16,000 leaves; or if some smaller collection, taken as representative of the whole, such as ten hands, should weigh four pounds, this representative collection must contain more than 400 leaves. Here we are not to have in view, as in the other test, the separate parts of the leaves, for the language of the act expressly provides for the condition that "100 leaves are required to weigh a pound." The word *leaves* plainly means leaves in their natural state, or whole leaves.

The application of the rule to the case at bar is clear.

It is held both in the *Erhardt Case*, 155 U. S., at p. 130, and in the *Rosenwald Case*, 35 U. S. App., at p. 98, as in so many prior cases, that the presumption is always with the collector. The Board of General Appraisers, therefore, in order to reverse his decision, was bound to find that he had erred.

No evidence was before it upon which such a finding could be based. It did not appear that 85 % of the leaves were too large. It did not appear that 85 % were too coarse. Nothing whatever appeared as to the average weight of leaf in any of the bales. It did, indeed, appear that some of the bales had been rated as containing 80 % or less of the more highly taxed tobacco. This method of assortment might, however, have been based upon the question of weight alone; and the Treasury practice as to the weight test had no reference to the average weight of leaf in the bale. (Syn. Dec., 8368.)

To obtain information on this point, the Board of General Appraisers should have called upon the collector for further information. This the Board would doubtless have done had not their decision been filed during the period between the Blumlein and Erhardt decisions, when they were proceeding upon a mistaken theory.

It is more than possible that the weight of the average leaf in the bale may have been less than 1/100 lb. in every case in which the examiner returned the bale as containing 50 % of heavy-weight tobacco. This is, indeed, very probable; and it is even probable where the examiner returned a greater percentage of heavy-weight tobacco, for the prevailing weight of Sumatra wrapper

tobacco is very much less than 1/100 lb. per leaf. It is even less than 1/130 lb. per leaf. (Remarks of Senator Platt, Cong. Rec., Feb. 13, 1883, p. 2564.) The heavy-weight leaf, which first began to appear in the later days of the tariff of 1883, seems to have been a comparatively rare variety, which had been discovered to be especially adapted to the requirements of the United States tariff legislation.

We have said that the action of the examiner may have been based upon considerations of weight alone, and not of size or fineness. This is enough for the purposes of the present case. It may be added, however, that this is extremely probable. In every case that has so far come before the courts it has affirmatively appeared either that no examination was made as to size and fineness (all Sumatra leaf tobacco being presumed to be fit for wrappers) or that, an examination having been made, the examiner found that such was the fact. In the Erhardt case the importer claimed at the trial that part of the tobacco was unsuitable in size or fineness, but his claim was based on the fact that some of his tobacco had been broken on the voyage or had been insect eaten, etc.—claims rarely made, and part of which would have been relevant only on an application for an allowance under Rev. St., § 2927, or an abandonment under the Customs Administrative Act, § 23.

We may add in closing that the question before the Board of General Appraisers is plainly one of classification and not of valuation. The duty is specific, not *ad*

valorem; and the commercial value of the tobacco leaf is not affected by its weight. (*Erhardt* v. *Schroeder*, 155 U. S., at p. 130.)

IV.

The importance of the case fully justifies a writ of *certiorari.*

The amount involved, namely, over $691,000, is larger than in any previous tariff case where a writ has been applied for. The case, moreover, involves a definition of the nature of the proceedings for review in the Circuit Court under the Customs Administrative Act. Such proceedings are almost of everyday occurrence, and it is extremely important that their precise nature shall be definitely known.

It is respectfully submitted that the application should be granted.

HOLMES CONRAD,
Solicitor General.
EDWARD B. WHITNEY,
Assistant Attorney General.

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No. 606. 235.

Reply Brf. of Atty. Gen'l Conrad & Wh.
for Appellant (on Petition)

Filed Oct. 13, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIES & CO. } No. 606.

REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIES & CO. } No. 606.

REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

The learned counsel for the importers commence their brief with the very novel claim that the decisions which led the Board of General Appraisers to sustain the protest in this case were in nowise overruled by *Erhardt* v. *Schroeder*, 155 U. S., 124. If so, the argument of that case was conducted under a mistaken impression by counsel on both sides of it; and the undersigned, one of whom participated in that argument, are not sufficiently acute to discover the point of reconciliation. Nor are they able to appreciate the convincing character of an opinion which seems to them to have been written without careful examination either of the case which it cites or the statute upon which that case was decided; which statute, indeed, the learned counsel seem to have stopped reading just where the court did.

Two new arguments are made, however, which the undersigned feel able to cope with:

First, that if the Government contention is sustained, the importers will always be able, by filing "a perfunctory and colorless petition" (whose form "could easily be sold like law blanks by stationers"), to await "the benefit of anything in the way of a favorable decision that may turn up." Unfortunately, the importers are not entire strangers to such practices even now; but if their papers are too "perfunctory and colorless" their applications are subject to a motion to dismiss. If the Government files an application and asks, as the importers here did, "for a review of the questions of law and fact," it admits that all the questions of law and fact are before the court; but it is willing to take the risk of this, as it is not in the habit of filing the "perfunctory and colorless" applications toward which these importers so much fear that they will be tempted. In the thirty days to which the Government is restricted, on the other hand, it is always in danger, as here, of failing to be sufficiently advised of its rights, being not so well organized for rapid and effective customs litigation as are the able and erudite specialists who protect the interests of the merchants. It is not until a petition for review is actually filed that the Department of Justice has cognizance of the controversy. Consequently, if, as the undersigned believe, the filing of a "perfunctory and colorless" application by the importers operates to extend the Government's time for examining into the merits of a case, it is believed that the public interests will not so much suffer.

Second. Counsel argue that the action of the circuit court was equivalent to an order permitting them to withdraw their application for review. Were this so, it would have been equally appealable; for when, after an action has actually been put upon trial, plaintiff admits that he has no case, and defendant has a good counterclaim upon which no new action can be brought by him on account of the Statute of Limitations, it is error for the court to permit a nonsuit. (*Johnson* vs. *Bailey*, 59 Fed. Rep., 670, and cas. cit.; *Estell's Exrs.* vs. *Franklin*, 29 N. J. Law, 264.)

But this was no motion to withdraw. The circuit court granted no leave to withdraw. "The above cause coming on for hearing and determination before this court," and the evidence being submitted, and the applicant conceding that he had no case, and the Government pressing for a reversal, the court "ruled that the collector and Secretary of the Treasury or either of them [neither of them, by the way, being a party] could not be allowed to impeach or in any way object to the said decision," etc.; and therefore ordered, *adjudged, and decreed* "that the decision be in all things affirmed." This is clearly a decree upon final hearing, and has no analogy to such action as Mr. Justice Field suggested in Grisar's Case.

Respectfully submitted.

HOLMES CONRAD,
Solicitor General.

EDWARD B. WHITNEY,
Assistant Attorney General.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES,
Appellant,

vs.

GEORGE P. LIES & CO.,
Appellees.

Brief in Opposition to Application for Writ of Certiorari.

The opinion of the Court of Appeals in this case is such a conclusive refutation of the contention of the Solicitor-General that, notwithstanding the fact that it is annexed to the certified copy of the record filed on this application, we have deemed it wise, for the convenience of the Court, to annex it as an appendix to this brief memorandum in reply, and we most respectfully request a careful perusal of it before a decision is made on this application.

Two questions are raised by the Solicitor General on this application:

1st. That the decision of the Board of General Appraisers (affirmed by the Circuit Court and Court of Appeals) was erroneous.

2d. That the Collector had the right to have these errors reviewed and corrected in the courts, notwithstanding he had never filed any petition for review containing a statement of the errors of law and fact complained of, as required by Section 15 of the Customs Administrative Act.

If the Solicitor-General is wrong in his second contention, it becomes unnecessary to consider his first. And it is, in our opinion, so clear beyond question that his contention as to the right of review is erroneous that in this brief reply we shall make no further reference to his contention that the decision of the Board of General Appraisers is in conflict with later decisions of this Court, than to state at this point that *we emphatically deny that any such conflict exists*, or that there is any error in the decision of said board. On the contrary, we insist that the decision of the board is in entire harmony with the decision of this Court and of the Circuit Court of Appeals, and that it is only by misreading and misconstruing the Court's decisions that a plausible foundation is laid for claiming an inconsistency. When, in a proper suit, where the government is entitled to raise these questions, this contention as to inconsistency is urged, we shall be prepared to show that the decisions of the Courts, as properly read and interpreted in the light of the records in the cases decided and the points involved, are consistent one with the other, and that the decision of the Board of General Appraisers is in harmony with all of them.

But these questions need not now be considered, because *the only parties who have, under the law, a right to have this decision reviewed have acknowledged it to be correct*, and the party who now seeks to review the decision (the United States) has no right to such a review by reason of its *failure to comply with the statutory formalities* which are a *condition precedent* to the assertion of such a right.

Prior to August 1st, 1890, erroneous classifications and assessments were reviewed in common-law suits against Collectors wherein the entire burden was cast upon the importer of proving, first, that the classification was erroneous, and, second, that he had complied with all the requirements imposed by statute as conditions precedent to his procuring such a review. The Collector was a mere nominal defendant, and the statutes imposed no conditions whatever upon him as to the conduct of the litigation.

The Customs Administrative Act revolutionized the procedure in this regard. It created a Board of Customs Experts to pass upon protests against the action of Collectors, and in express terms *made the decision of that board final against the Collector and Secretary of the Treasury* (as well as the importer) unless the dissatisfied party filed a petition in the Circuit Court within a prescribed time, setting forth the errors of law and fact which he wished to have reviewed. The language of the statute (Sections 14 and 15) is as follows:

Their decision, or that of a majority of them, shall be *final and conclusive* upon all persons interested therein, and the record shall be transmitted to *the proper collector* or person acting as such, who *shall liquidate the entry accordingly*, except in cases where an application shall be filed in the Circuit Court within the time and in the manner provided for in Section 15 of this act."

" Section 15. That if the owner, importer, consignee or agent of any imported merchandise, *or the Collector, or the Secretary of the Treasury*, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in Section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, they, or either of them, may, *within thirty days next after such decision and not afterward*, apply to the Circuit Court of

the United States within the district in which the matter arises for a review of the questions of law and fact involved in such decision. **Such application shall be made by filing in the office of the Clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the Collector, or on the importer, owner, consignee or agent, as the case may be."**

It will be noted that the portion of Section 14 of the Act above quoted does not appear in the Solicitor-General's brief at all, that a material portion of Section 15 is slurred over with asterisks, and that the words of Section 15 printed above in heavy black type, though quoted by the Solicitor-General and referred to in one line on page 11 of his brief are not discussed by him, and *no attempt whatever is made by him to explain why these words should be inserted in the statute if they have no further significance than that which he allows them.*

Why should a dissatisfied party be required to file a petition for review within "thirty days next after" a decision "and not afterwards" if he can have the decision reviewed at any time afterwards without filing any petition at all?

Why should a dissatisfied party be required to "file a concise statement of the errors of law and fact complained of," if, as the Solicitor-General claims, the whole case may be reviewed, not only at his instance, but even at the instance of the party who filed no petition at all.

Why should the statute require a copy of the concise statement to be served "upon the Collector or upon the owner, importer, consignee or agent, as the case may be," if the information it contains is useless to him, because he knows that any question raised by either party may be argued and decided by the Court, irrespective of whether it is referred to in the petition or not.

The requirements of Sections 14 and 15 of the Customs Administrative Act are, like the requirements of Sections 3011 and 2931 of the Revised Statutes, which they superseded, *conditions precedent* to a right of review. The difference between the two systems is that under the present system, as to decisions of the Board of General Appraisers, *the conditions precedent to a right of review apply to the Government* (through the Collector or Secretary of the Treasury) *as much as to the importer*. Referring to the statutory requirements as to protest and suit under the old system, this Court said in Arnson vs. Murphy (115 U. S., 579, at p. 584):

"We are of the opinion that it is incumbent upon the importer to show, in order to recover, that he has fully complied with the statutory conditions which attach to the *statutory action* provided for."

"The conditions imposed by the statute cannot, any of them, be regarded as matters a failure to comply with which must be pleaded by the defendant as a statute of limitation. *The right of action does not exist independently of the statute, but is conferred by it.*"

And in Davies vs. Arthur (96 U. S., 148, at p. 151):

"He must set forth in his protest the grounds upon which he objects, distinctly and specifically, the reason being, as ruled by Chief-Justice TANEY, that *the words of the act* requiring the protest *are too emphatic to be overlooked* in the construction of the provision (Mason vs. Kane, Taney's Dec., 177").

"Two objects, says Judge CURTIS, were intended to be accomplished by the provision in the act of Congress requiring such a protest: (1) To apprise the Collector of the objections entertained by the importer, before it should be too late to remove them if capable of being removed. 2. To hold the importer to the objections which he then contemplated, and on which he really acted, and *prevent him, or others in his behalf, from seeking out defects in the proceedings, after the business should be closed*, by the payment of the money

into the treasury (Warren vs. Peaselee, 2 Curt., 235; Thomson vs. Maxwell, 2 Blatchf., 392)."

It will not, of course, be contended by the Solicitor-General, that while the party who has taken no appeal from the decision of the Board of General Appraisers may raise any question as to errors that may have occurred to him by the time the case is reached for argument, the dissatisfied petitioner shall be restricted to the errors set forth in the petition. The consequence of his contention being sustained would, therefore, be that the importer would not be held "to the objections which he then contemplated, and on which he really acted," and he would not be prevented, "or others in his behalf, from seeking out defects in the proceedings after the business should be closed." In other words, the Solicitor-General *would revive the very evils which the statutes have sought to abolish*, and reduce the administration of the revenue laws to chaos. If he is correct in his contention, all an importer has to do when an unfavorable decision is rendered on his protest by the Board of General Appraisers is to file a perfunctory and colorless petition in the Circuit Court *(a brief printed form could easily be sold like law-blanks by stationers)*, and he will thereafter be entitled to the benefit of anything in the way of a favorable decision that may turn up. Indeed, if it shall happen that the Collector has also been dissatisfied with the decision, and has filed a petition, he need not do even that.

It is respectfully submitted that *such a contention is unworthy of serious consideration*, and that, whether the amount involved is six dollars and ninety-one cents or six hundred and ninety-one thousand dollars, this Court should not be asked to give up its time to the argument of any such proposition.

It is just as important that this Court should pass on the question raised below in this case as it is that it should pass on the question whether two and two are four, or whether a part is equal to the whole.

The California Land Claim Statutes are not analogous to the Customs Administrative Law. Under those statutes the mere filing of a transcript of the proproceedings of the Board of Commissioners *operated* "*ipse facto as an appeal for the party against whom the decision shall be rendered.*" The Customs Administrative Law requires the dissatisfied party "within thirty days, and not afterwards, to file a concise statement of the errors of law and fact complained of." Whatever other analogies there may be between these two statutes *they are absolutely dissimilar in the very point which lies at the foundation of the present application.*

By reason of this essential difference between the statutes the case of Grisar vs. McDowell, relied on by the Solictor General, furnishes no support to the present application. But even in that case (where both parties had continued the contest in the Circuit Court), Mr. Justice FIELD said :

"Had the city accepted the leave granted, withdrawn her appeal and proceeded under the decree as final, such result (close of the controversy) would have followed."

And in view, no doubt, of this suggestion the Solicitor-General concedes :

"It follows that, *could the importers have obtained leave of court to withdraw their application* for review, and *withdrawn it* accordingly, *the United States might have been without remedy.*"

The judgment of the Circuit Court recites (fols. 69, 70) :

"And the said George P. Lies & Company *having conceded in open court that there was no error* in said decision of the Board of General Appraisers ;

"Now, *after hearing* W. Wickham Smith, of *counsel for said importers, in support of* the decision of said appraisers, and Wallace Macfarlane, *U. S. Attorney, in opposition thereto,*

"It is ordered, adjudged and decreed that the decision of the Board of General Appraisers be, and the same is hereby, *in all things affirmed.*"

Why a decision should become final against the Government if a claimant *withdraws his appeal* from it, but not if he *confesses its correctness* in open court and *insists on the affirmance* of it, the Solicitor-General does not tell us, and we think the Court will be at a loss to perceive.

It will thus be seen that so far as it has any application to the case at bar the case of Grisar vs. McDowell, so far from being an authority in favor of the Solicitor-General's contention, is an authority in support of the ruling of the Court of Appeals.

The application for a writ of *certiorari* should be denied.

CHARLES CURIE,
W. WICKHAM SMITH,
DAVID IVES MACKIE,
Attorneys for Appellees.

APPENDIX.

OPINION OF THE CIRCUIT COURT OF APPEALS.

LACOMBE, Circuit Judge:

A certain importation of leaf tobacco was classified for duty by the Collector at the port of New York, certain portions at 75 cents per pound, and certain other portions at 35 cents per pound. The importers being dissatisfied with such decision, did, within the proper time, in compliance with the provisions of Section 14 of the Customs Administrative Act of June 10, 1890, "give notice in writing to the Collector, setting forth therein distinctly and specifically the reasons for their objections thereto." The Collector thereupon transmitted the invoice and all the papers and exhibits connected therewith to the Board of General Appraisers. That board, in one particular, sustained the protest of the importers, and in all other particulars affirmed the decision of the Collector.

Being dissatisfied with the decision of the board, the importers applied to the Circuit Court for a review of the questions of law and fact involved in such decision, and filed, as the fifteenth section of the above-cited act requires, "a concise statement of the errors of law and fact complained of." Before the case was reached for hearing in the Circuit Court a decision of the Supreme Court was reported, which satisfied the importers that they had no chance of success. Therefore, when the case was called, they conceded in open court that there was no error in the decision of the Board of General Appraisers, and the Court adjudged that "the decision of the Board of General Appraisers be, and the same is hereby, in all things affirmed." The District Attorney on behalf of the United States insisted in the Circuit Court that that Court should re-

view the decision of the board as far as it was favorable to the importers. This the Court refused to do, and the United States has appealed from such decision.

The Circuit Court was clearly right. Section 14 provides that the decision of the Board of General Appraisers "shall be final and conclusive upon all persons interested, and the record shall be transmitted to the proper collector, * * * who shall liquidate the entry accordingly, except in cases where an application shall be filed in the Circuit Court within the time and manner provided for in Section fifteen of this act." Section 15 provides that if the owner, importer, consignee, or agent of imported merchandise, or the Collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in Section 14 of this act, as to the construction of the law, and the facts respecting the classification of such merchandise, and the rate of duty imposed thereon under such classification, they, or either of them, may, within thirty days next, after such decision, *and not afterwards*, apply to the Circuit Court * * * for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the Clerk of said Circuit Court *a concise statement of the errors of law and fact complained of*, and a copy of such statement shall be served on the collector or on the importer, owner, consignee or agent as the case may be.

The elaborate argument submitted upon the question whether or not the Board of General Appraisers is a court, and whether Congress had power, under the Constitution, to clothe it with judicial powers, is irrelevant. Congress has expressly provided, as it had the undoubted right to do, that the decision of the Collector as to rate and amount of duties on imported merchandise shall be final and conclusive, unless these questions are brought before the Board of General Appraisers in the manner provided in the act; and that the decision of the Board shall be

final and conclusive except when application for a review is made to the Circuit Court *in the manner provided in the act.* Names are nothing; it is immaterial whether this is called an appeal, or a review, or a transmission of the case; any person who is dissatisfied with a decision of the board must set forth his grounds of dissatisfaction and file the same in the Circuit Court and may apply to that Court for a review within thirty days next after such decision, *and not afterwards.*" If he fail to apply for a review within the limited time his remedy in the Circuit Court is lost. The case at bar is clearly distinguishable from Grisar vs. McDowell, 6 Wallace, 363, for in that case, as it is stated on page 367, "a transcript of the proceedings and decision of the Board [of land commissioners] was filed in the District Court; *this operating under the statute of August 31, 1852, as an appeal by the party against whom the decision was given.*" The Customs Administrative Act of 1890 contains no such clause, nor anything like it.

The decision of the Circuit Court is affirmed.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIES & CO. } No. 235.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is brought from the circuit court of appeals for the second circuit by a writ of *certiorari*. It is one of 27 similar pending cases growing out of the Sumatra

leaf tobacco controversy, and involving, altogether, over $691,000. Two questions are raised:

First. A question of procedure under the customs administrative act of June 10, 1890 (26 Stat., 131, ch. 407), being the nature and effect of the application to the circuit court for a review under section 15. (See Appendix.)

Second. A question of classification—the classification of leaf tobacco under paragraphs 246 and 247 of Schedule F, of the tariff act of March 3, 1883 (22 Stat., 488, 503, ch. 121), which read as follows:

> 246. Leaf tobacco, of which eighty-five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound.
>
> 247. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound.

The character of the merchandise and the action of the collector is set forth in the following stipulation of counsel (Rec., pp. 16, 17):

> The entry for warehouse of the merchandise in question bears date *June 30, 1890*, and covers *two lots of Sumatra leaf tobacco not stemmed:* One lot marked "L. & Co., Nos. 101/192," 92 bales, and the other lot the same marks, Nos. 193/410, 218 bales, making an aggregate of 310 bales. Attached to said entry is the official weigher's special re-

turn of the merchandise, duly made by J. Jardine, United States weigher, dated July 19, 1890, giving the gross weight of the tobacco, the actual and schedule tare, and the net weight of the tobacco; and on the back of said weigher's return appears a further return, showing the weight and tare of each and every one of the 310 bales of tobacco involved.

The invoice in evidence of the merchandise is in the German language, and is dated at Amsterdam, June 13, 1890, and is to Messrs. George P. Lies & Co., of New York, covering 310 bales of Sumatra tobacco, by the marks and numbers as stated in the foregoing entry, the gross weight and the tare being given in kilograms. This invoice was duly certified before the United States consul at Amsterdam, and upon the face of the invoice appears the return, in red ink, of the United States examiner at the port of New York: "Leaf tobacco, not stemmed, 35c. and 75c. Pars. 246 and 247, T. I. new." *And on the back of said invoice appears in red ink the numbers of the bales of tobacco examined by the appraiser, with the note,* "*Thirty-nine bales, as noted as per memo. attached, balance classified.* July 19/90. C. H. R. D. F. Burke." And underneath, in blue ink, "Approved, M. W. Cooper, appraiser." Attached to the invoice appears the following *table of returns made by Mr. Charles H. Roberts, United States examiner, of the bales ordered to the public store by the collector for examination and the percentage of each examined bale returned by the appraiser as dutiable at*

35 cents and at 75 cents per pound, respectively, which list is as follows:

Lots.	Plantation length and color marks.	Bales ordered for examination.	Percentage.	
			35cents.	75cents
L. & C. 101/5	B B 1	105	80	20
106/13	V 1	106	.....	100
114/16	G 1	116	70	30
117/22	S 1	117	60	40
123/52	S L 1	123	20	80
	S L 1	133	60	40
	S L 1	143	60	40
153/63	S S 1	153	100	.....
	S S 1	163	90	10
164/92	S S L 1	164	30	70
	S S L 1	174	10	90
	S S L 1	184	60	40
193/224	B B 1	193	100	.....
	B B 1	203	100	.....
	B B 1	213	90	10
	B B 1	224	90	10
225/27	L 1	225	.....	100
228/49	L 1	228	60	40
	L 1	238	70	30
288/49	V 1	249	40	60
250/54	G 1	250	50	50
255/62	K 1	262	20	80
263/84	S 1	263	100	.....
	S 1	273	90	10
	S 1	284	100	.....
285/337	S L 1	285	90	10
	S L 1	295	30	70
	S L 1	305	60	40
	S L 1	325	60	40
	S L 1	337	60	40
338/59	S S 1	338	100	.....
	S S 1	348	90	10
	S S 1	359	70	30
360/410	S S I 1	360	80	20
	....do ...	370	60	40
	....do ...	380	20	80
	....do ...	390	90	10
	....do ...	400	80	20
	....do ...	410	60	40

July 19/90. C. H. R.

The tobacco was of uniform grade, and the examination of the representative bales by the Government officer was made by drawing not less than ten "hands" from each bale, the hand consisting of a

certain quantity of leaves tied together by the stems. The collector classified the tobacco according to the percentages returned by the appraiser, dividing the examined bale and the lot represented by such bale into corresponding percentages of 75-cent and 35-cent tobacco.

It will be observed that the invoice covered 310 bales of Sumatra tobacco. Sumatra tobacco is wrapper tobacco, and the stipulation shows that all this tobacco "was of uniform grade." Of this invoice the collector designated for examination 39 bales. The lots represented by the bales thus ordered for examination are indicated in the foregoing table. There were in all 17 lots, represented by 39 bales.

Lot No. 1, of 6 bales, was represented by 1 bale;
Lot No. 2, of 8 bales, by 1 bale;
Lot No. 3, of 3 bales, by 1 bale;
Lot No. 4, of 6 bales, by 1 bale;
Lot No. 5, of 30 bales, by 3 bales;
Lot No. 6, of 11 bales, by 2 bales;
Lot No. 7, of 19 bales, by 3 bales;
Lot No. 8, of 32 bales, by 4 bales;
Lot No. 9, of 3 bales, by 1 bale;
Lots 10 and 11, of 22 bales, by 3 bales;
Lot 12, of 5 bales, by 1 bale;
Lot 13, of 8 bales, by 1 bale;
Lot 14, of 22 bales, by 3 bales;
Lot 15, of 53 bales, by 5 bales;
Lot 16, of 22 bales, by 3 bales;
Lot 17, of 51 bales, by 6 bales.

The examiner drew from the representative bale not less than ten hands, the hand consisting of a certain

number of leaves tied together by the stems. He ascertained by inspection of the leaves whether the tobacco was of the requisite size and fineness required for wrappers. As appears by the stipulation referred to, all leaves in all the hands examined were of the size and fineness of texture required for wrappers, the tobacco being "of uniform grade." This is usually the fact, as in the *Blumlein Case* (49 F. R., 228, 231), and *Rosenwald Case* (67 F. R., 323, 325). [See Appendix.] Having by inspection ascertained that the tobacco was of the size and texture required for wrappers, the examiner then weighed the hands separately to ascertain whether the leaves ran over or under one hundred to the pound, and divided the hands into two classes, one consisting of those in which the hands ran more than one hundred to the pound, and the other of those in which they ran less. So many tenths of the bale as there were hands of the former class were returned as dutiable at 75-cents per pound, and so many as there were hands of the latter class were returned as dutiable at 35 cents a pound.

This appears from the last two columns headed "percentage." Thus, of the ten hands drawn from the bale representing lot 1 consisting of 6 bales, two of the hands were made up of leaves running more than one hundred to the pound, and eight of the hands of leaves running one hundred or less to the pound. Twenty per cent of the representative bale, and, therefore, of the lot of 6 bales for which it stood, was regarded as 75-cent tobacco, and 80 per cent as 35-cent tobacco. This method was followed throughout. "The collector classified the tobacco according to the percentages returned by the

appraiser, dividing the examined bale and the lot represented by such bale into corresponding percentage of 75-cent and 35-cent tobacco." (Rec., bottom p. 7.)

Against this action of the collector in classifying the tobacco and fixing the rate and amount of duties chargeable upon it, the importers protested under the fourteenth section of the customs administrative act. The protest contains twenty-four grounds of objection, is voluminous and comprehensive, evidently intended to anticipate and cover every possible construction of paragraphs 246 and 247 that the courts might make. (Rec., pp. 5 to 8, inclusive.)

In his letter transmitting to the Board of General Appraisers the protest, invoice, and all papers and exhibits, the collector stated (Rec., bottom p. 4):

> I have to state that the appraiser reported that a certain portion of the tobacco included in the above importation was of the requisite size, fineness of texture, etc., to be suitable for wrappers, and *upon that portion only* duty was assessed at the rate of 75 cents per pound under the provisions of T. I. new 246, S. 7350, 8299, and 8368.

The protest was transmitted by the collector to the Board of General Appraisers September 13, 1890, but the decision of the board on the matter was not rendered until July 18, 1893. Meantime, on April 18, 1893, the *Blumlein Case* [see appendix] was decided by the circuit court of appeals for the second circuit (55 F. R., 383). In this case it was held that the unit in classifying tobacco under paragraphs 246 and 247 of the act of March 3, 1883, is the bale, and that the 85-per-cent clause refers to weight as well as size and fineness; in other words,

under this decision, a bale of unstemmed leaf tobacco is dutiable at 75 cents per pound if 85 per cent of it is of the requisite size, fineness, and weight, under paragraph 246.

Following the *Blumlein Case*, the Board of General Appraisers decided as follows (Rec., p. 9):

> The United States circuit court of appeals recently decided in the case of Blumlein, and we so hold in the cases now under consideration, that *the bale is the unit*, and that a bale of leaf tobacco, of which 85 per cent is of the requisite size, fineness, *and weight*, is dutiable at 75 cents, and when there is a less percentage at 35 cents, per pound.
>
> A point which the court did not feel called upon to decide, but which is raised in the protests before us, and which is now raised by the appellants, is that no bales of tobacco other than those actually opened and examined by the appraiser, and found to contain more than the requisite 85 per cent, are liable to a higher rate of duty than 35 cents a pound.
>
> We are of the opinion that *an examination of one bale in ten*, of plantation lots, *is a fair and lawful examination* of merchandise, and is in accordance with section 2901, Revised Statutes. While such an examination might not furnish a precise description of the goods, there is no reason to suppose that it would not be as favorable to the importer as to the Government.
>
> It is difficult, it is true, to decide just what bales are represented by the bales examined, inasmuch as the bales ordered to the public stores were not selected serially from decades.
>
> *In the absence of the merchandise and of any evidence to impugn the returns of the appraiser, or to show the character of the tobacco, we find that the*

> *returns were correct*, and, in accordance therewith, we hold that in the reliquidation the lots must be prorated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per cent or less of wrapper tobacco.
>
> To this extent the protests are sustained. Otherwise the decisions of the collector are affirmed.

The decision overruled a number of objections in the protest. It sustained the sufficiency of the examination made under the direction of the collector, and the correctness of the returns of the appraiser showing the character of the tobacco. The erroneous part of this decision, as now viewed by the Government, is the holding that—

> In the reliquidation the lots must be prorated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per cent or less of wrapper tobacco.

The result of this decision and order is that all the tobacco classified by him as 75-cent tobacco, according to the percentage columns in the foregoing table, must be reduced and classified as 35-cent tobacco, except where the last column, headed 75 cents, shows 90 per cent or more of 75-cent tobacco. In other words, under the method pursued by the examiner, nine hands must have been tobacco running over 100 leaves to the pound in

order that the bale and the lot it represented should be classified as 75-cent tobacco. There were only three bales of that sort examined. The representative bale of lot No. 2, consisting of eight bales, of which 100 per cent or ten hands was 75-cent tobacco; one of the three representative bales of lot 7, consisting of 19 bales, contained 90 per cent or nine hands of 75-cent tobacco; the representative bale of lot 9, consisting of three bales, contained 100 per cent or ten hands of 75-cent tobacco.

Of the 39 bales examined, representing the invoice of 310 bales, but 3 bales contained at least nine hands of 75-cent tobacco. The other 36 representative bales contained each only eight hands or less of 75-cent tobacco, and therefore they and the lots they represented were ordered classified by the Board of General Appraisers as 35-cent tobacco.

The importers, being dissatisfied with the decision of the Board of General Appraisers, on August 15, 1893, under section 15 of the customs administrative act, filed an application (Rec., pp. 1 and 2) in the circuit court "for a review of the questions of law and fact involved in such decision," claiming that the Board of Appraisers erred:

First. As a matter of fact in finding that the returns of the local appraiser as to the character of the tobacco were correct.

Second. As a matter of law—

In holding that an examination of one bale in ten of a plantation lot of tobacco is a lawful examination;

In holding that any portion of the tobacco except the bales actually examined was dutiable at more than 35 cents per pound;

In affirming in any particular the collector's decision, so far as the same operated to impose a duty of 75 cents per pound on any of the tobacco;

In holding that in the reliquidation the lots must be prorated according to the return of the appraiser.

The prayer of the application was as follows (Rec., p. 2):

> Accordingly, your petitioners respectfully pray the court to order the said Board of General Appraisers to return to the court the record and evidence taken by the said board, together with a certified statement of the facts involved in the above case, and of its decision thereon; and thereupon, and upon such further evidence as may be hereafter taken pursuant to the statute in such cases made and provided, *to proceed to review said decision, and to determine the questions of law and fact involved in same.*

The fifteenth section of the customs administrative act [see appendix] provides that after the filing of the application for review—

> The court shall order the Board of Appraisers to return to said circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decision thereon; and all the evidence taken by and before said appraisers *shall be competent evidence* before said circuit court.

This section further provides that within twenty days after such return is made, the court may, upon application—

> Refer it to one of said general appraisers, as an officer of the court, to take and return to the court

> *such further evidence* as may be offered by the Secretary of the Treasury, collector, importer, owner, consignee, or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and *such further evidence, with the aforesaid returns, shall constitute the record* upon which the said circuit court *shall* give priority to and *proceed to hear and determine the questions of law and fact involved* in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such court shall be final, and the proper collector or person acting as such shall liquidate the entry accordingly.

In accordance with these provisions, and on motion of the importers, the court, on August 15, 1893, ordered the Board of Appraisers to "return to this court the record and evidence taken by them, * * * together with certified statement of the facts in the case and their decision thereon." (Rec., bottom p. 3.)

This was done, and *on October 7, 1893*, on motion of the importers, the court ordered:

> That the above-entitled matter be, and the same hereby is, referred to General Appraiser George H. Sharpe, to take and return to this court such further evidence as may be offered in said matter. (Rec., middle p. 10.)

In this situation, with the case referred to General Appraiser Sharpe to take and return such further evidence as might be offered, the matter was allowed to rest pending the decision of the case of *Erhardt* v. *Schroeder* (155 U. S., 124). [See Appendix.] This case was decided November 12, 1894. In it this court held:

First. That the burden is not upon the Government

to sustain the action of the collector in classifying such tobacco by showing his return was correct, but, on the contrary, upon the importers to overrule his action by showing that the return was incorrect.

Second. That in classifying tobacco under paragraphs 246 and 247, when of uniform grade and quality, the bale may properly be regarded as the unit, and the 85-per-cent test applies only to the size and fineness of texture of the leaves, the weight test being applicable to the average weight of the leaves in the bale; in other words, a bale of Sumatra tobacco of uniform grade is dutiable at 75 cents a pound if 85 per cent of it is of the size and fineness of texture requisite for wrappers, and if, on the average, the leaves in the bale run more than one hundred to the pound.

The court held that, in examining the tobacco, separate hands taken from a bale containing only leaves of one class, must not be treated as units, but that the hands should be separated and the statutory test applied to the general collection of all the representative leaves irrespective of their casual association in the separate hands. (155 U. S., 134.) Applying this to the weight test, if ten hands should be taken as a representative of a bale, and those ten hands should weigh 4 pounds, then the ten hands must contain more than 400 leaves. (155 U. S., 136.)

The *Schroeder Case* was decided November 12, 1894, but still the importers did not act on the reference to General Appraiser Sharpe. They awaited the decision of the circuit court of appeals in the *Rosenwald Case* (67 F. R., 323) [see Appendix], in which the importers were represented by the counsel who appear in the present case.

Finally, on March 5, 1895, the *Rosenwald Case* was decided. The court, following and applying the *Schroeder Case*, held that when the tobacco is of uniform grade and quality the bale is the unit, and the presumption being in favor of the correctness of the classification of the collector, the burden rests upon the importer to show that it is not correct. It therefore reversed the circuit court and sustained the collector, because the importer had not shown his action was incorrect. The matter was sent back to the collector in order that he might reliquidate, Judge Shipman, in his concurring opinion, saying there was "adequate data in the record and in the custom-house papers *to enable the collector to reliquidate with accuracy.*" *It was not to be presumed that there would be "any inherent difficulty in a reliquidation."*

After the decisions in the *Schroeder* and *Rosenwald cases*, it became apparent to counsel for Lies & Co. that they had fared better at the hands of the Board of General Appraisers than they would in the courts if the case were decided there upon its merits or with the collector if a reliquidation were had. In other words, the action of the Board of Appraisers, based on the *Blumlien Case*, could not be sustained under the law, as construed in the *Schroeder* and *Rosenwald cases*. *It therefore became the policy of opposing counsel to secure a judgment of the circuit court, but without a hearing on the merits, which would affirm the decision of the board, thus rendering it binding and conclusive upon the collector.* The dismissal of the application for review would throw the case back upon the decision of the board and admit of a reliquidation by the collector. On the other hand, a judgment by the

court would be conclusive against the Government and preclude a reliquidation. For this reason, on March 27, 1895, the importers, by their counsel, appeared before General Appraiser Sharpe and introduced the testimony shown in his report (Rec., p. 11), as follows:

NEW YORK, *March 27, 1895.*

Appearances:

For the importers: Curie, Smith & Mackie. (D. I. Mackie, of counsel.)

For the collector and Government: James T. Van Rensselaer, assistant United States attorney.

Mr. MACKIE. I offer in evidence the entry in this case by the *Rotterdam*, June 30, 1890, entry No. 104642, and the invoice and other papers accompanying the same or thereto attached with the exception of the protest.

Importers rest.

Adjourned without fixing date for further hearing.

Testimony closed.

Observe, that while the importers had the opportunity of introducing any evidence they had tending to show that the return of the appraiser or examiner, and the action of the collector, as to the character of the tobacco, was incorrect, they introduced no evidence whatever upon that point.

The court will note the situation at this point:

The importers had made application, under section 15 of the act of June 10, 1890, to the circuit court for a review of the questions of law and fact involved in the decision of the Board of Appraisers.

The court had ordered the board to return the record and the evidence taken, together with a certified state-

ment of the facts involved, and its decision thereon, and this had been done.

On application of the importers, the matter had been referred to General Appraiser Sharpe to take and return to the court such further evidence as either of the parties might desire to offer, and this had been done.

The matter was therefore in condition to be submitted to the circuit court, upon argument, and the statute enjoined the court to give priority to "and proceed to hear and determine the questions of law and fact involved in such decision respecting the classification of such merchandise and the rate of duty imposed thereon under such classification."

The Government, through the United States attorney, contended that the court, in the discharge of the duty imposed by this act, should proceed to hear and determine *all* the questions of law and fact involved in the matter before it, and should reverse the decision of the Board of General Appraisers for manifest errors therein; but the court, refusing to hear and determine the questions of law and fact involved in the decision of the Board of General Appraisers, nevertheless, upon the concession of the importers that there was no error in the decision of the Board of General Appraisers, *proceeded to affirm such decision in all things, and thus give it the strength of a judicial determination.* There was no dismissal of the application (or appeal, as the importers term it), but an affirmance of the decision. The following is the judgment (Rec. p. 12):

> The above cause *coming on for hearing and determination* before this court, on the application of

George P. Lies et al., composing the firm of George P. Lies & Co., importers, *for a review of the questions of law and of fact involved in the decision of the Board of General Appraisers* herein, and on the return of the Board of General Appraisers of the record and evidence taken by them, with their certified statement of the facts involved therein, together with their decision thereon, no petition for review of such decision of the Board of General Appraisers having been applied for by the collector or Secretary of the Treasury;

And the said George P. Lies & Co. having conceded in open court that there was no error in said decision of the Board of General Appraisers, and it having been contended on behalf of the collector and Secretary of the Treasury that the said decision of the Board of General Appraisers should be reversed for manifest error therein;

And the court having ruled that the collector and Secretary of the Treasury, or either of them, could not be allowed to impeach or in any way object to the said decision of the Board of General Appraisers, because they had not proceeded under the statute to seek a review of such decison of the said Board of General Appraisers;

Now, after hearing W. Wickham Smith, of counsel for said importers, in support of the decision of said appraisers, and Wallace Macfarlane, United States attorney, in opposition thereto,

It is ordered, adjudged, and decreed that the decision of the Board of General Appraisers *be and the same is hereby in all things affirmed.*

(Signed) HOYT H. WHEELER.

The cause came on for hearing and determination on the record and evidence. The importers having conceded

there was no error in the decision of the board, the court held that the Government could not be allowed to impeach it, because it had not filed an application for its review, and thereupon adjudged that the decision be in all things affirmed.

From this judgment and decree the United States appealed to the circuit court of appeals, which, in an opinion delivered by Lacombe, judge (Rec., p. 18), affirmed the judgment of the circuit court, refusing to consider the case on its merits, and affirming the decision of the Board of Appraisers because the importers conceded it to be correct.

ARGUMENT.

I.

The power to collect revenue by levying duties is a sovereign right. In the exercise of this right Congress is, of course, subject to the limitations fixed by the Constitution. The agencies selected to collect the revenue, and the mode in which these agencies operate, must not contravene the Constitution; but, subject to these limitations, Congress has full power in the premises.

It is a fundamental principle that property can not be taken without due process of law. For this reason, in the collection of customs duties, a method is provided by which a dissatisfied importer may appeal to the courts and have a judicial determination of the questions of law and fact involved. The mode of review in court thus provided is ample to satisfy the requirements of the Constitution. The preliminary summary method, through

agencies of the Government intrusted with the duty of collecting its revenue, is wholly within the discretion of Congress, subject, of course, to the rule that the principle of equality must be observed.

In the leading case of *McMillen* v. *Anderson* (95 U. S., 37) it was held that the provision of the Louisiana law, that a person against whom taxes are assessed may enjoin their collection and have their validity determined, constitutes due process of law.

This Court, speaking by Mr. Justice Miller, said (p. 41):

> The mode of assessing taxes in the States by the Federal Government, and by all governments is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done.
>
> But that does not mean, nor does the phrase "due process of law" mean, by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation.

The taxing laws of both Federal and State governments provide usually for a method of revision in the first instance by taxing officers before an appeal to the courts, whether by injunction or other proceeding, is warranted. In the appraisement of property for taxation under the laws of the different States, taxing tribunals, with authority to review and correct, are usually provided. Ultimately a resort may be had to the courts, for these taxing tribunals are not and can not be vested with

judicial power. They exercise simply discretion and judgment, or, as it is termed, quasi-judicial power. The judicial power can only be vested, under our various constitutions, in the courts.

The same method has been followed by Congress in the laws providing for the collection of customs duties. Opportunity has always been afforded the importers to appeal to some superior customs officer or officers for a review and correction of the errors of subordinates, and ultimately a resort to the courts has been provided.

Thus, section 2930, Revised Statutes, and the thirteenth section of the customs administrative act, which supersedes it (see Appendix), provide for a review of the appraisement made by the appraising officer; in other words, for a reappraisement.

Section 2931, Revised Statutes, and section 14 of the customs administrative act, which supersedes it (see Appendix), provide for a protest and appeal from the action of the collector in classifying the imported goods and fixing the rate and amount of duties. Section 2931 provided for an appeal from the collector to the Secretary of the Treasury; section 14 provides for an appeal to the Board of General Appraisers. Both the Secretary of the Treasury and the Board of General Appraisers are customs officers of the Government. While each acts in a quasi-judicial capacity, exercising discretion and judgment, neither is a court.

The resort to the court, in order to constitute due process of law, was regulated under the old law by sections 3011 and 3012, Revised Statutes (see Appendix), which

have been superseded by section 15 of the customs administrative act. Sections 3011 and 3012 provided for a suit to recover back duties alleged to have been erroneously or illegally exacted by the collector; while section 15 provides for an application to the circuit court to review the questions of law and fact involved in the decision of the Board of General Appraisers.

No suit to recover back could be brought under sections 3011 or 3012 by an importer unless a protest had been filed by him with the collector, and an appeal taken to the Secretary of the Treasury under section 2931; and no application can be filed in the circuit court for a review of the questions of law and fact involved in the decision of the Board of General Appraisers, unless the importers have duly appealed from the action of the collector to the Board of General Appraisers, under section 14. The statutes in existence before the passage of the customs administrative act have been repeatedly before this court, and it has been held that they carried only such relief to the importers as Congress deemed it expedient to grant. While they gave the importer the right to protest against the decision of the collector, to appeal to the Secretary of the Treasury, and then to carry his case into the courts by a suit to recover back, the Government on its part was not precluded from availing itself of all its rights at any stage of the proceeding.

The collector and the Secretary of the Treasury were Government officers charged with the collection of customs revenue, and in the court, after the suit to recover back was brought, the Government might introduce any defense

calculated to sustain the action of the collector or the Secretary of the Treasury. In other words, the Government was not required to define its position while the matter pended before either the collector or the Secretary, for the reason that they were Government officers. It was only necessary, when a case came on for hearing in court, to introduce such defense as might then appear expedient.

In a broad sense all this is true of the present customs administrative act. The remedy by protest to the Board of General Appraisers, under the fourteenth section, is a remedy granted the importer, just as the appeal to the Secretary of the Treasury, under section 2931, was a remedy granted the importer. The decision of the Secretary, under section 2931, was made final and conclusive against the importer, unless he carried his case into the courts. So, the decision of the Board of Appraisers, under the fourteenth section, is made final and conclusive "upon all persons interested therein, unless the matter is carried into the circuit court in the mode provided in the fifteenth section.

The action of the Secretary of the Treasury under section 2931, and the action of the Board of General Appraisers under the fourteenth section, in each instance is the decision of a special customs tribunal which represents the Government, and is final and conclusive as against the importers, unless the matter is carried into the courts. The only difference is that section 14 substitutes the Board of Appraisers for the Secretary of the Treasury, as provided in section 2931, Revised Statutes.

Under section 15, either the importers or the Government, acting through the collector or the Secretary of the Treasury, may carry the case into the courts. But in both instances, under the old law and under the present law, when the case has been carried into the courts, the whole case, so far as it concerns the Government, remains open, the only limitation being that the importers are entitled to such relief only as is covered by their protest.

The case of *Erhardt* v. *Schroeder* (see Appendix) was a case under the old law. Compare it with the case before the court. In the *Schroeder Case* the decision appealed from was one by the Secretary of the Treasury; in the present case the decision sought to be reviewed is one by the Board of General Appraisers. In each case, a decision of the special Government tribunal, the Secretary of the Treasury, or Board of General Appraisers, was conclusive against the importers unless the case was carried into the courts. In both cases, when the matter was carried into the courts, the Government was free to introduce its full defense, and the courts to consider the case on its merits, and, if just and proper, send the matter back for reliquidation by the collector.

II.

After comparing generally the old law and the new, regulating the review of the action of the collector, and an appeal, if necessary, to the courts, it may be of service to analyze the provisions of the existing law

The scheme of appraisement, of liquidation, and of review marked out by the customs administrative act of June 10, 1890, is as follows:

The importer makes his entry and files his declaration as to the value of the goods (sec. 5). The appraiser ascertains the actual market value and wholesale price of the merchandise in the principal markets of the country whence imported (sec. 10). This the appraiser returns to the collector (sec. 13). If objected to, a reappraisement may be obtained, first by the general appraiser and then by the Board of General Appraisers (sec. 13). If not objected to, or after reappraisement, it becomes the duty of the collector to ascertain, fix, and liquidate the rate and amount of duty to be paid (sec. 13). If the importer is dissatisfied with the decision of the collector as to the rate and amount of duties he may protest, and the action of the collector comes for review before the Board of General Appraisers (sec. 14).

The decision of this board is final and conclusive as against the importer unless an application be filed in the circuit court for a review of the questions of law and fact involved in such decision (sec. 14). In case an application is filed in the circuit court "*for a review of the questions of law and fact*" involved in the decision of the Board of General Appraisers, the record and the evidence taken by the board, together with a certified statement of the facts involved in the case and their decision thereon, is returned to the circuit court, and then the case is referred to one of the general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered; and such further evidence,

with the returns from the Board of General Appraisers, "*shall constitute the record* upon which said circuit court shall give priority to *and proceed to hear and determine the questions of law and fact involved in such decision* respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such court shall be final," unless the case is carried to a higher court (sec. 15).

It is to be observed—

First. The protest under the fourteenth section is limited to the importer; the Secretary of the Treasury, if dissatisfied with the action of the collector, does not protest, but directs a reliquidation under sections 249, 251, 2652, and 2949 of the Revised Statutes, and section 21 of the act of June 22, 1874 (18 Stat., 186).

Second. That the application to the circuit court, under the fifteenth section, is not an appeal from a decision of the Board of General Appraisers in a contested matter before it, *but the institution of what is really an original proceeding in the circuit court, to review all the questions of law and fact involved in the decision of the board.* And these questions are not decided simply upon the record which was before the board, but there is a provision for the trial of the case, as an original matter, by the circuit court, the record and evidence before the board being treated as competent evidence before the court, but provision being made for the introduction of new and additional evidence before the circuit court on behalf of both parties, importers and Government.

The fourteenth section [see Appendix] provides "that the decision of the collector as to the rate and amount of

duties" upon imported merchandise "shall be final and conclusive against all persons interested therein," unless the importer shall, within the time fixed, "give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reason for his objections thereto." Upon such notice the collector is required to transmit the invoice and all the papers and exhibits to the Board of General Appraisers, "which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector, * * * who shall liquidate the entry accordingly, except in cases where an application shall be filed in the circuit court" under section 15.

The decision of the collector "as to the rate and amount of duty chargeable upon imported merchandise" is made "final and conclusive against all persons interested therein," unless the importer protests and carries the case to the board. It is evident that the phrase, "against all persons interested therein," used near the beginning of the fourteenth section, refers to the persons interested in the merchandise, for only such persons can protest and carry the case to the Board of General Appraisers. The decision of the collector is not final and conclusive as against the Government, for the collector, on his own motion, or by direction of the Secretary of the Treasury, may reliquidate at any time within one year. (*Beard* v. *Porter*, 124 U. S., 4–37.)

Near the close of the fourteenth section it is provided that the decision of the board "shall be final and conclusive upon all persons interested therein" unless an application for review is filed in the circuit court under the fifteenth section. For the reasons stated, it is manifest that the decision of the collector is only conclusive as against "all persons interested" in the merchandise—that is, against the importers; whether the decision of the Board of Appraisers, upon a protest, is final and conclusive "upon all persons interested" in the case—that is, upon the collector and Secretary, representing the Government, as well as upon the importers—is a disputed question, which does not, however, affect the decision of this case, whatever view the court may take of it.

The contention of the importers is that the decision of the board is conclusive against the Government, unless the Government, through the collector or Secretary, makes an application for a review by the circuit court under the fifteenth section. In support of this, they point to the provision, near the close of the fourteenth section, that the decision of the board shall be final and conclusive "upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, unless an application be filed in the circuit court." Also to the provision, near the beginning of the fifteenth section, that if the collector or Secretary is dissatisfied with the decision of the board, he may, within thirty days thereafter, apply to the circuit court for a review.

On the other hand, the Secretary of the Treasury has taken, and still takes the view, that whether the case is or is not carried before the board by a protest of the importers, the right to reliquidate, for the purpose of assessing higher duties, in a proper case, where an error is discovered in the original liquidation, remains with the Secretary of the Treasury, as heretofore, under sections 249, 251, 2652, and 2949 of the Revised Statutes, and section 21 of the act of June 22, 1874. (*Beard* v. *Porter*, 124 U. S., 437.)

The exercise of this right to reliquidate, because of errors discovered in the original liquidation, does not deprive the importers of any right granted for their protection by the existing customs administrative law. The right to protest against the action of the collector in reliquidating would remain (*Robertson* v. *Downing*, 127 U. S., 613), and the ultimate result would be that the decision of the board, upon the case as it really existed, would be followed, unless the matter was carried to the court upon an application for review. The Secretary of the Treasury, of course, does not contend that the collector has a right to ignore and disregard the decision of the Board of Appraisers upon a protest, but only that he has a right, within the time limited by the statute, to reliquidate and asesss higher duties because of errors in the original liquidation discovered subsequent thereto.

But whether the right to reliquidate, after a decision by the board under the fourteenth section, does or does not exist, the final and conclusive character of the deci-

sion of the board, under this section, is limited to cases *where no application for a review is "filed in the circuit court within the time and in the manner provided for in section 15."* The fourteenth section provides that the decision of the board shall be final and conclusive "upon all persons interested therein," and the collector shall liquidate the entry accordingly, but expressly excepts all cases where an application for review is filed in the circuit court under section 15. *The filing of the application for review, no matter by whom, whether by importer or by Government, supersedes the decision of the board, and suspends its operation, and leaves the matter open until the court finally decides the case thus originally presented to it.*

Section 15 provides, that if the importer or the collector, or the Secretary of the Treasury shall be dissatisfied with the decision of the board, under section 14—

> *as to the construction of the law and the facts* respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises *for a review of the questions of law and fact involved in such decision.* Such application shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and facts complained of, and a copy of such statement shall be served on the collector or on the importer [&c.] as the case may be.

This gives the collector, as well as the importer, the right to apply to the circuit court. The applicant is

required to file "a concise statement of the errors of law and fact complained of," and serve a copy on the opposite side; *but the application is not for a review of the errors of law and fact thus complained of, but for "a review of the questions of law and fact involved in such decision."* Upon the filing of the application, whether by the importer or the collector, and the making of service, the circuit court obtains jurisdiction of the case for the purpose of a full review and a final and conclusive determination.

It will be observed that no provision is made for the filing of any answer or counter application by the other side. After the case gets into the circuit court, *it is a matter not of pleading but of procedure.* The duty of the court with respect to the case is marked out plainly by the statute, which proceeds:

> Thereupon the court shall order the Board of Appraisers to return to said circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decision thereon; and all the evidence taken by and before said appraisers shall be competent evidence before said circuit court.

Thus, the entire record upon which the Board of Appraisers acted in rendering its decision is brought before the circuit court. For what purpose? Not simply to review the errors complained of, but to review all the questions of law and fact involved in the decision.

In order that both sides may have ample opportunity (from whichever side the application came) to present the

entire case to the court for its complete and conclusive decision, the statute proceeds as follows:

> And within twenty days after the aforesaid return is made, the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, *to take and return to the court such further evidence as may be offered* by the Secretary of the Treasury, collector, importer, [etc.] within sixty days thereafter * * * ; and *such further evidence, with the aforesaid returns, shall constitute the record* upon which said circuit court shall give priority to and *proceed to hear and determine the questions of law and fact involved* in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification.

The case being before the court, each side, by this reference, is afforded the opportunity to introduce further evidence, and after the evidence is all in, the circuit court is enjoined to give priority to and proceed to hear and determine the questions of law and fact involved in the decision. The application is not treated as an *ex parte* proceeding. The filing of it is simply the method provided for the institution of a suit in the circuit court. When it is filed and served the whole case is before the circuit court. The record and evidence before the Board of Appraisers is returned, and a reference made, so that each party may introduce any additional evidence he may deem expedient. Then the court is enjoined to give priority to the case and determine all the questions of law and fact involved.

The judgment of the circuit court is made final and conclusive unless the case is carried to a higher court, the statute providing:

> The decision of such court shall be final, and the proper collector, or person acting as such, shall liquidate the entry accordingly, unless, etc.

Following the provision for an appeal to this court (now superseded by the provision for an appeal to the circuit court of appeals), the section provides that "on such *original application*, and on any such appeal," security shall be given. The appellate court is given jurisdiction—

> to review such decision, and shall give priority to such cases, and may *affirm, modify, or reverse such decision* of such circuit court and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

It is to be noted that while the circuit court is given jurisdiction "to hear and determine the questions of law and fact" involved in the decision of the Board of Appraisers, the appellate court is given jurisdiction to review the decision of the circuit court, "and may affirm, modify, or reverse such decision." The statute recognizes the application to the circuit court as an "original application," and the appeal to the higher court as an "appeal."

In conclusion, it is provided:

> All final judgments, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in section 23 of this act.

This may serve to explain why the importers were so solicitous in the present case to obtain a judgment of the

circuit court, being unwilling to dismiss their application and rest upon the decision of the Board of Appraisers.

III.

The application for review in the circuit court is not an appeal or a proceeding in error to review a judicial determination made by the Board of Appraisers. It is an original application to the circuit court to review the ministerial act of a special customs tribunal charged with quasi-judicial functions and the exercise of discretion and judgment in the execution of the customs laws.

The fact is to be kept carefully in mind, that the collection of the revenue of the Government is not a judicial but an executive act regulated by legislative enactment. The judicial power of the Government can only be vested in the courts. The Board of Appraisers is composed of customs experts. It is not a court, but an agency of the Government for the more summary collection of its revenues. Under every system of taxation there are not only the officers charged with the preliminary duties, but revising officers and boards charged with the duty of reviewing and correcting the action of their subordinates. The customs administrative act created the Board of General Appraisers, not as a court, but as an effective revising agency of the customs department, which, in a summary manner, could revise and correct the errors of the appraisers, examiners, and collectors.

The proceeding before the Board of Appraisers is not a judicial one between private parties respecting prop-

erty or personal rights, but a matter between the Government acting through its agents, and the citizen. In order to afford the citizen every opportunity of being dealt with justly and lawfully, the application for review to the circuit court is provided. This application does not regard the proceeding before the board as a judicial one from which error can be prosecuted or an appeal taken. It could not. In the case of *Musser* v. *Adair* (55 O. S., 466) an attempt was made to prosecute error to the common pleas court of Ohio from a decision of the auditor placing certain property upon the duplicate for taxation.

The supreme court of Ohio, citing the case of *Logan Branch Bank, ex parte* (1 O. S., 433), held that the court could not entertain a proceeding in error; that such a proceeding is in the nature of an appeal, and invokes appellate jurisdiction, and an appeal can only be taken from one court to another. The auditor did not act as a court, but a mere agent of the State in enforcing its tax laws.

IV.

The application provided for by section 15 of the customs administrative act is a statutory action, and of course must be governed by the provisions of the statute regulating it. At the same time a reference to the cases of *United States* v. *Ritchie* (17 How., 525) and *Grisar* v. *McDowell* (6 Wall., 363), arising and decided under the California land claims act, may be of service to the court.

The act of March 3, 1851 (9 Stats., 632), "to ascertain and settle the private land claims in the State of California," provided, in its ninth section, that after a decision

of the board of land commissioners either party could "present a petition to the district court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim."

This section was repealed in the following year by section 12 of the civil and diplomatic appropriation act of August 31, 1852 (10 Stats., 99), which provided that in every case in which the board of commissioners should render a final decision a transcript should be filed with the clerk of the district court, and that the filing of such transcript should "*ipso facto* operate as an appeal for the party against whom the decision shall be rendered." A copy of the transcript was to be transmitted to the Attorney-General. It was further provided:

> And if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk aforesaid within six months thereafter of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the Attorney-General, within six months after receiving said transcript, to cause a notice to be filed with the clerk aforesaid, that the appeal will be prosecuted by the United States; and *on a failure of either party to file such notice with the clerk aforesaid, the appeal shall be regarded as dismissed.*

The tenth section of the act of 1851 provided:

> The district court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court.

In *United States* v. *Ritchie* (17 How., 525, 535) this court, speaking by Mr. Justice Nelson, said:

> It is also objected that the law prescribing an appeal to the district court from the decision of the board of commissioners is unconstitutional, as this board, as organized, is not a court under the Constitution, and can not, therefore, be invested with any of the judicial powers conferred upon the General Government. (*American Insurance Company* v. *Canter*, 1 Peters, 511; *Benner* v. *Porter*, 9 How., 235; *United States* v. *Ferreira*, 13 How., 40.)
>
> But the answer to the objection is that *the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court.* The transfer, it is true, is called an appeal. We must not, however, be misled by a name, but look to the substance and intent of the proceeding. *The district court is not confined to a mere reexamination of the case, as heard and decided by the board of commissioners, but hears the case de novo upon the papers and testimony which had been used before the board, they being made evidence in the district court, and also upon such further evidence as either party may see fit to produce.*

These remarks apply forcibly to the application for review under section 15 of the customs administrative act. The circuit court is not confined to a mere reexamination of the case as heard and decided by the Board of Appraisers, but hears the case *de novo* upon the record and evidence returned by the board, that being made competent evidence in the circuit court, and also upon

such further evidence as either party may see fit to produce before the appraiser to whom the matter is referred.

In the case of *Grisar* v. *McDowell* (6 Wall., 363) the plaintiff claimed the land by a conveyance from the city of San Francisco. The defendant claimed to hold it as an officer of the United States. The board of commissioners decided partly in favor of San Francisco and partly in favor of the United States. Accordingly, under the act of 1852, the transcript of the decision filed with the clerk of the United States district court operated *ipso facto* as "an appeal" for both parties. Each party filed a notice of intention to prosecute the appeal. The Attorney-General, however, by a formal notice and stipulation, dismissed the appeal of the United States. It was insisted, upon the argument, that the dismissal of appeal by the United States debarred it, upon the hearing of the city's appeal, from asserting its own claims. Upon this point the court, speaking by Mr. Justice Field, expressed itself as follows (pp. 374–375):

> The appeal was by statute for the benefit of the party against whom the decision was rendered; in this case of both parties—of the United States, which contested the entire claim, and of the city, which asserted a claim to a greater quantity than that confirmed—and both parties gave notice of their intention to prosecute the appeal. Subsequently, in February, 1857, the Attorney-General withdrew the appeal on the part of the United States, and in March following the district court, upon the stipulation of the district attorney, ordered

that appeal to be dismissed, and gave leave to the city to proceed upon the decree of the board as upon a final decree. The counsel of the plaintiff contended that this decree closed the controversy between the city and the United States as to the lands to which the claim was confirmed. But in this view they are mistaken. *Had the city accepted the leave granted, withdrawn her appeal, and proceeded upon the decree as final, such result would have followed. But this course she declined to take. She continued the appeal for the residue of her claim* to the 4 square leagues. *This kept open the whole issue with the United States.* The proceeding in the district court, though called in the statute an appeal, was not in fact such. It was essentially *an original suit, in which new evidence was given and in which the entire case was open.*

After quoting from the opinion in *United States* v. *Ritchie*, *supra*, the learned justice proceeded (pp. 375, 376):

The dismissal of the appeal on the part of the United States did not, therefore, preclude the Government from the introduction of new evidence in the district court or bind it to the terms of the original decree.

The authorities cited by counsel to show that when only one party appeals from a decree in a California land case the other party can not urge objections to the decree or insist upon its modification have no application. They are adjudications made in cases of appeal from the district court to the Supreme Court where the case is heard on the record from the court below and where error upon the record alleged by the appellant is alone considered, or in cases where an attempt has been made upon supple-

mentary proceedings on a survey of the land confirmed to deviate from the terms of the original decree.

As pointed out before, the importers did not dismiss or withdraw their application for review, and content themselves with resting upon the decision of the Board of Appraisers. For their own purposes, even after the decisions in the *Schroeder* and *Rosenwald cases*, they desired a judgment of the circuit court, and proceeded with that end in view to introduce additional testimony before General Appraiser Sharpe, have such testimony returned to the court, and have a hearing and determination by the circuit court. Such hearing and determination, of necessity, under the express language of the statute, was of all the questions of law and fact involved in the decision of the board.

The court could not hear and determine these questions without according the Government the opportunity to be heard upon them, *under the law and the facts as presented to the court*, not under the law and facts as presented to the Board of Appraisers. And the court could determine these questions only in accordance with the law and the facts before it. The court can not be bound by the contention or concession of one party against the protest of the other when once the case is submitted to it upon the law and the facts. Suppose that, on the hearing before the circuit court, additional evidence should be introduced, showing conclusively that the decision of the Board of Appraisers, which the importers alone had made application to have reviewed, was clearly

erroneous, but not in the particular contended for by the importers.

Suppose it should be shown beyond doubt, by the additional testimony, that the goods were of a character requiring classification under a paragraph imposing a higher duty than that under which the board classified them. Would the Government lose the benefit of this showing because it had not filed a counter-application? Would the court be compelled either to sustain the contention of the importers, and classify the goods under a paragraph imposing a lower rate than that found by the board, or else affirm the decision of the board? In other words, is it possible that the court, after the record and additional evidence have been brought before it, is powerless to do justice between the Government and the importers, and render a decision in accordance with the law and the facts?

The only reason for holding as the lower courts did in this case is the existence of the rule as to protests *which applies only to importers.* It is true that the importer is limited to the specific claim set out in the protest. But the protest is required by section 14. The Government is not required to protest. The importers alone are required to protest. The presumption is in favor of the regularity and validity of the action of the Government officers. The importer who is dissatisfied must point out the particular grounds of his objection.

There is no provision for a protest under the fifteenth section. The importer who carries his case into the courts under that section does it at his peril. He runs the risk

of getting less than the board has given him when he applies to the court for a review of the entire matter. He does not carry the case to the court upon certain exceptions, or upon certain questions of law presented in a record. While he is required to make a statement of the errors of law and fact complained of, he applies for a review of all questions of law and fact involved in the decision. He presents an "original application," and must abide a decision of the court upon the entire case as presented to it.

V.

An abstract of the cases upon the subject of the classification, under paragraphs 246 and 247, of Sumatra leaf tobacco,—the *Falk Case*, the *Soby Case*, the *Blumlein Case*, the *Schroeder Case*, and the *Rosenwald Case*,—is printed as an appendix to this brief. A reading of these cases will satisfy the court that if the circuit court had deemed itself free to enter into the merits and decide the questions of law and fact involved in the decision of the Board of General Appraisers, it would have reversed that decision and remanded the case, either with directions to affirm the action of the collector or send the matter back to the collector with instructions to reliquidate, under the law as construed by this court in the *Schroeder Case*.

The decision of the board was based upon the *Blumlein Case*, and can not be supported except upon the theory that that case is still authority upon both the decided points, namely, that the bale is the unit and that

the 85 per cent applies to weight as well as to size and fineness of texture.

It sufficiently appears from the record that all the tobacco was Sumatra leaf; that it was of uniform grade, and therefore of size and texture fit for wrappers. It does not appear what would be the result if the weight test laid down by this court in the *Schroeder Case* had been applied. Following the rule then in vogue, the examiner treated the 85 per cent as applicable to the weight test. He examined each representative hand separately. He then divided the bale and the lot it represented into 75-cent or 35-cent tobacco in accordance with the result of his application of the weight test to the individual representative hand.

If one hand ran more than one hundred leaves to the pound, one-tenth of the bale and of the lot it represented was put down as 75-cent tobacco. He did not make an examination of the ten hands collectively, as he should have done under the Schroeder decision. He did not bunch the ten hands and ascertain how, on the average, the leaves ran with respect to weight. Such an examination might have shown that *all* the tobacco was dutiable at 75 cents. The hands taken as indicating 75-cent tobacco may have contained leaves so light in weight as to more than overbalance the heavier leaves contained in the hands which were taken as indicating 35-cent tobacco, if the statutory test had been applied to the general collection of all the representative leaves, irrespective of their casual association in the respective hands.

For these reasons it does not appear, and the importers did not show, either before the Board of General Ap-

praisers or the circuit court, that the tobacco returned by the collector as dutiable at 75 cents was not of the character and grade described in paragraph 246.

It is respectfully submitted that the judgments of the circuit court of appeals and the circuit court should be reversed and the case remanded to the circuit court with instructions to enter a judgment reversing the decision of the Board of General Appraisers.

JOHN K. RICHARDS,
Solicitor-General.

APRIL 15, 1898.

APPENDIX.

REAPPRAISEMENT.

SEC. 2930. If the importer, owner, agent, or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector in writing of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly.

PROTEST AND APPEAL TO SECRETARY AS TO DUTIES.

SEC. 2931. On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry as to the rate and amount of duties to be paid on the tonnage of such vessel, or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive *against all persons interested therein*, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied

on tonnage, or the owner, importer, consignee, or agent of such merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of customs, as well in cases of merchandise entered in bond as for consumption, *give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto*, and shall, within thirty days after the date of such ascertainment and liquidation, *appeal therefrom to the Secretary of the Treasury. The decision of the Secretary* on such appeal shall be *final and conclusive;* and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, *unless suit shall be brought within ninety days* after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal, in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

PROTEST AND APPEAL AS TO CHARGES.

SEC. 2932. The decision of the respective collectors of customs as to all fees, charges, and exactions of whatever character, other than those relating to the rate and amount of duties to be paid on the tonnage of any vessel,

or on merchandise and the dutiable costs and charges thereon, claimed by them, or by any of the officers under them, in the performance of their official duty, *shall be final and conclusive against all persons interested in such fees*, charges, or exactions, unless the like notice that an appeal will be taken from such decision to the Secretary of the Treasury shall be given within ten days from the making of such decision, and unless such appeal shall actually be taken within thirty days from the making of such decision; and the decision of the Secretary of the Treasury shall be final and conclusive upon the matter so appealed, unless suit shall be brought for the recovery of such fees, charges, or exactions, within the period as provided for in the preceding section in regard to duties. No suit shall be maintained in any court for the recovery of any such fees, costs, and charges, alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless such decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

SUITS TO RECOVER BACK DUTIES.

SEC. 3011. Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, *may maintain an action* in the nature of an action at law, which shall be triable by jury, *to ascertain the validity of such demand and payment of duties*, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest [*in writing, and*

signed by the claimant or his agent, was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection to the amount claimed] [and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one].

BILL OF PARTICULARS.

SEC. 3012. No suit shall be maintained in any court *for the recovery of duties alleged* to have been erroneously or illegally exacted by collectors of customs unless the plaintiff, within thirty days after due notice of the appearance of the defendant, either in person or by attorney, serves on the defendant or his attorney *a bill of particulars of the plaintiff's demand*, giving the name of the importer or importers, the description of the merchandise, and place from which imported, the name of the vessel, or means of importation, the date of the invoice, the date of the entry at the custom-house, the precise amount of duty claimed to have been exacted in excess, the date of payment of said duties, the day and year on which protest was filed against the exaction thereof, the date of appeal thereon to the Secretary of the Treasury, and date of decision, if any, on such appeal. And if a bill of particulars containing all the above-mentioned items be not served as aforesaid, a judgment of non pros. shall be rendered against the plaintiff or plaintiffs in said action.

CUSTOMS ADMINISTRATIVE ACT OF JUNE 10, 1890.

(26 Stat., Chap. 407, 131, 137.)

SEC. 14. That the *decision of the collector* as to the rate and amount of duties chargeable *upon imported merchandise*, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive *against all*

persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after, "but not before," such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port, or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive *upon all persons interested therein*, and the record shall be transmitted to the proper collector, or person acting as such, who shall liquidate the entry accordingly, *except in cases where an application shall be filed in the circuit court* within the time and in the manner provided for in section fifteen of this act.

SEC. 15. That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, *they or either of them*

may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises, *for a review of the questions of law and fact involved in such decision.* Such application shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall order the Board of Appraisers to return to said circuit court *the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decisions thereon;* and all the evidence taken by and before said appraisers *shall be competent evidence* before said circuit court; and within twenty days after the aforesaid return is made the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, to take and return to the court *such further evidence as may be offered* by the Secretary of the Treasury, collector, importer, owner, consignee, or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and *such further evidence with the aforesaid returns shall constitute the record* upon which said circuit court shall give priority to and proceed *to hear and determine the questions of law and fact involved in such decision* respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and *the decision of such court shall be final*, and the proper collector, or person acting as such, shall liquidate the entry accordingly, unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision by the Supreme Court of the United States, in which case said circuit court, or the judge making the decision, may, within

thirty days thereafter, allow an appeal to said Supreme Court; but an appeal shall be allowed on the part of the United States whenever the Attorney-General shall apply for it within thirty days after the rendition of such decision. *On such original application* and on any such appeal security for damages and costs shall be given as in the case of other appeals in cases in which the United States is a party. Said Supreme Court shall have jurisdiction and power to review such decision, and shall give priority to such cases, *and may affirm, modify, or reverse such decision of such circuit court, and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly. All final judgments,* when in favor of the importer, *shall be satisfied and paid by the Secretary of the Treasury* from the permanent indefinite appropriation provided for in section twenty-three of this act. For the purposes of this section the circuit courts of the United States shall be deemed always open, and said circuit courts, respectively, may establish, and from time to time alter, rules and regulations not inconsistent herewith for the procedure in such cases as they shall deem proper.

CASES ON THE CLASSIFICATION OF SUMATRA LEAF TOBACCO.

Falk v. *Robertson* (137 U. S., 225), November 24, 1890; Blatchford, judge.

An action at law in the supreme court of New York to recover back the duties paid under protest on leaf tobacco imported into New York from Holland in January and April, 1884. Due protest and appeal.

Tobacco imported in bales. Eighty-three per cent of the contents of each bale was leaf tobacco, dutiable at 75 cents under paragraph 246, act of March 3, 1883; the remaining 17 per cent was inferior tobacco, called "fillers." The 75-cent tobacco was Sumatra tobacco.

The other tobacco was separated from it by strips of paper or cloth, the bale being repacked in Holland for the purpose of reducing the wrapper tobacco below 85 per cent per bale.

The court held that under these circumstances the bale was not the unit upon which the 85 per cent was to be calculated; but that, the wrapper tobacco being separable, it would be treated as a unit, and 85 per cent of it being of the description dutiable at 75 cents, the whole of the wrapper tobacco was so dutiable.

Middle page 232:

> "The statute does not refer to tobacco in bales. It does not say that the 85 per cent is to be 85 per cent of the contents of a bale; but the duty of 75 cents per pound is imposed upon any quantity of leaf tobacco of the specified quality and weight, if not stemmed. * * * The unit is not the bale, but is the separated quantity of such leaf tobacco. That quantity stands, for the purposes of duty, as if it had been imported in a bale which contained nothing but itself. By the method of packing, the wrapper tobacco and the filler tobacco remained entirely distinct. The association of them in the bale was, evidently, only for the purpose of avoiding the higher duty imposed upon the superior tobacco. This association was to be dissolved the moment the bale was opened in the United States, because the two grades of tobacco sold for different prices in the market. It appears from the testimony of one of the plaintiffs that, prior to the act of 1883, the bale of Sumatra tobacco that was known and dealt in was a bale containing about 160 or 170 pounds of that tobacco, and inferior tobacco was not imported in the same bale with such Sumatra tobacco. The unit of the statute, therefore, must be held to be leaf tobacco wrappers answering

the description which, when reaching the named percentage, is subject to the duty of 75 cents a pound."

Soby v. *Hubbard, collector* (49 F. R., 234), January 27, 1892; C. C. district of Connecticut; Shipman, judge.

Action to recover back from the collector at Hartford duties paid under protest on an importation of Sumatra tobacco from Amsterdam in June, 1890. Soby purchased from Shroeder 100 bales of Sumatra leaf tobacco, to be used for wrappers, shipped first from Holland to New York, and thence without appraisement to Hartford. The invoice consisted of two plantation lots, one of 43 bales and one of 57 bales. The tobacco in the lot was of uniform quality. Upon the entry of the goods in Hartford the two lots were separately examined, weighed, and appraised by the appraiser. Five bales of the first, or "Lankat," lot and 6 bales of the second, or "Senembah," lot were examined. Ten hands were drawn from different parts of each bale. The hands were separately weighed and the leaves in each counted. No examination as to size or fineness of texture was made.

As to the Lankat lot, the appraiser reported 93¼ per cent, or 6,941 pounds, at 75 cents per pound, and the remainder, 460 pounds, at 35 cents per pound. As to the Senembah lot, the appraiser reported 83 and a fraction per cent, or 8,194 pounds, at 75 cents per pound, and the remainder, 16 per cent and a fraction, or 1,622 pounds, at 35 cents per pound. The duty was paid on the Lankat lot and it was withdrawn, so that no question arises with respect to it. The duty on the Senembah lot, according to the return of the appraiser, was paid under protest, and suit brought to recover it back.

Held: That since only 83 per cent of the Senembah lot was 75-cent tobacco, the whole lot was dutiable at 35 cents a pound.

At page 236:

> "The facts in this case are very different from those in the Falk Case, but the idea which the court gives of the proper unit upon which calculation is to be made is also applicable to different states of fact. The unit is the separable and separated quantity of leaf tobacco wrappers of substantially uniform grade. *A whole invoice, fairly packed, and consisting of one grade or lot might be a proper unit.* When the invoice consists of two or more separate lots of different grades it can not be the unit. When bales are falsely packed, or the tobacco is fraudulently admixed with "filler" tobacco, or two classes of tobacco are presented in one bale, the leaf tobacco in wrappers, answering the statutory description in each bale, is, as in the Falk Case, properly the unit. In this case, there were two separate lots, all the tobacco was for wrappers, the lot in question was of uniform grade, and there was no fraudulent admixture of inferior tobacco. *I am of opinion that the proper unit was the quantity of tobacco in the Senembah lot.*"

In re Blumlein (55 F. R., 383); April 18, 1893; C. C. Appeals, second circuit; Lacombe, judge.

Blumlein imported from Amsterdam into New York 37 bales of unstemmed Sumatra leaf tobacco, consisting of three lots, containing 10, 18, and 9 bales, respectively. As a result of the examination made the collector decided that there was in the 10-bale lot 20 per cent of 75-cent tobacco; in the 18-bale lot, none; in the 9-bale lot, 60 per cent. Duty was accordingly assessed upon 20 per cent of the 10-bale lot, and 60 per cent of the 9-bale lot, at 75 cents per pound, and on the residue at 35 cents per pound. The importers appealed to the Board of General Appraisers, protesting that the entire importation was subject to duty only at 35 cents per pound. The

Board of General Appraisers, *pro forma*, sustained the collector; thereupon the importers appealed to the circuit court, which reversed the decision of the board and of the collector, and directed that the tobacco should be classified at 35 cents a pound. From this judgment the Government appealed.

Held: First. That the unit upon which the percentage is to be calculated is the bale; if it be of uniform quality, and if 85 per cent of the examined bale, and, therefore, of the lot it represents, is not 75-cent tobacco, under paragraph 246, the entire bale and the lot it represents is dutiable at 35 cents a pound.

Second. The 85 per cent clause does not refer merely to size and fineness, but to size, fineness, and weight.

Page 385:

> "When this kind of tobacco is packed at the place of production, the leaves are first tied together in packages called hands. The number of leaves in the hand varies. Sometimes the hand contains less than 20, sometimes more than 50, but the general average of leaves is about 35 to 40. From six to seven hundred of these hands are then packed in a bale. * * * A bale varies in weight from about 160 to 190 pounds."

Page 386:

> "In our opinion the statute does not authorize any such method of classification. It plainly contemplates the importation of tobacco of mixed grades, and provides that when it is thus mixed, and 85 per cent of it is of the higher grade, such mixed lot shall pay 75 cents per pound on all tobacco therein contained, whether of higher or lower grades. If the lot does not contain 85 per cent of the higher grade, the entire lot is to pay the lower duty. * * *
>
> "Commercially speaking, the aggregation of leaves of tobacco into the bale, however, is permanent. The

package thus formed remains unbroken, as in the course of trade it passes from hand to hand till it reaches the consumer. To that unit (the bale) any importation of tobacco can be reduced without difficulty. Below that unit it can not be reduced without commercially changing its condition."

Page 387:

"In the case at bar none of the bales examined contained 85 per cent of the higher grade. The collector was satisfied from his examination that the bales not examined conformed in all respects to the selected sample bales, and there is nothing before us to show that any of them contained the requisite percentage. None of the tobacco, therefore, came within the provisions of paragraph 246 or the decision of the Supreme Court in the Falk Case, for upon examination there was not found any 'separable and separated quantity' of leaf tobacco of which it could be said that 85 per cent was of the requisite size, fineness, *and weight* to be dutiable at 75 cents per pound.

"The appellant further contends that the 85 per cent clause refers only to size and fineness. We do not so read the statute. Though awkwardly expressed, its evident meaning is that leaf tobacco 85 per cent of which is of the requisite size, fineness, *and weight* is dutiable at 75 cents per pound."

Hubbard, collector, v. *Soby,* (55 F. R., 388); April 18, 1893; C. C. Appeals, second circuit.

The facts in this case are stated in the report of the case in the circuit court (*supra*). The judgment of the circuit court was affirmed, the court saying:

"In the case at bar the learned circuit judge held that the 'quantity of tobacco in the Senembah plantation lot' was the proper unit. Examination of

his opinion, however, discloses the fact that such holding was based on the proved fact that all the bales in the lot were of uniform grade. Where all the bales in a lot are thus uniform, the same result is reached, whether lot or bale be taken as the unit."

Erhardt v. *Schroeder* (155 U. S., 124). November 12, 1894. Shiras, judge.

Action in the superior court removed to the United States circuit court of New York, to recover back duties collected on an importation of leaf tobacco from Amsterdam, received November 5, 1888. The invoice consisted of 429 bales described as Sumatra tobacco. On the trial the inquiry was limited to 10 bales, upon 9 of which the importers paid duty at 75 cents a pound and upon 1 of which they paid duty at 75 cents on 125 pounds and 35 cents upon 54 pounds. In other words, upon this one bale the importers paid 75 cents a pound on 70 per cent of it and 35 cents a pound on the balance. They contended they should have been compelled to pay but 35 cents a pound on the entire 10 bales. The importers protested against the action of the collector, appealed to the Secretary of the Treasury, who decided against them, and then brought suit under section 3011, Revised Statutes.

On the trial the collector asked that the case might go to the jury upon the question whether there had been a proper examination made of the bales in controversy, claiming that, although there was not 1 bale in 10 sent to the public stores, there were only 10 bales in question, representing four plantation lots, and as 4 bales representing those 10 bales had been examined at the public stores, there was a sufficient compliance with the statute. The court refused to submit this question to the jury, and directed a verdict for the importers. The judgment was reversed and the case remanded for a new trial.

Held: First. On the contention of the importers that section 2939 requires that not less than 1 bale in 10 should be examined, *that the burden is on the importer to overcome the presumption of a legal collection by proof that the exaction of the duties was unlawful.*

Second. As to the character of the tobacco made dutiable at 75 cents a pound under paragraph 246, *the 85 per cent applies only to the size and fineness of texture of the half leaves*, and *the requirement as to weight has reference to the average number of leaves in the quantity of tobacco examined.*

Page 130:

> "In this view it is apparent that the usual presumption of a legal collection is not changed by the circumstances of this case, and *that the burden is upon the importer of overcoming this presumption by proof that the exaction of the duties was unlawful.*"

Page 133:

> If, then, a bale or other separate and concrete quantity of leaf tobacco contained only leaves of such uniformity of character as to be, in their collective form, of one class, *the bale*, or other separate collection, *would be the unit* contemplated in the percentage and weight tests of paragraph 246. On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class.

Bottom page 133, and page 134.

> "All the tobacco in question in this case, as the evidence on both sides shows, was raised in the same country, and was all of the class known to the trade as wrappers. Therefore, *any bales, or, indeed, the whole invoice*, if it might conveniently be treated as a whole for the purpose, *was just such a unit* as was

intended by the statute. Any other view of this legislation would make it meaningless, for the very term 'per cent' implies an understanding that the tobacco to be taxed, even though of a uniform grade, may contain some leaves possessing and some not possessing the qualifications required for the higher tax. In such a case, if separate hands, taken from a bale containing only leaves of one class, were treated as units, the result might be an inaccurate conclusion.

"Doubtless in the hands classed as containing tobacco dutiable at the lower rate there would be leaves having all the requisites of the higher grade, while in the hands ascertained to be taxable at the higher rate would be leaves of the lower grade. This might have the effect of making a division of tobacco of one commercial class into two grades with respect to taxation—a division which we do not believe to have been contemplated by the statute. *If the character of the tobacco is to be learned from an examination of a representative quantity therefrom, such as ten hands, the hands should be separated and the statutory tests applied to the general collection of all the representative leaves, irrespective of their casual association in the separate hands.*"

Top page 136:

"The most natural interpretation of the paragraph in question is to consider eighty-five per cent of half leaves, or suitable half leaves eighty-five in number out of half leaves one hundred in number as the requirement, and to regard the proportion of the weight of the suitable half leaves to the weight of all the leaves as immaterial.

"A further requirement of the act is that the leaves of the collection must be of such average lightness that more than one hundred are required to weigh a

pound; that is to say, if the collection should weigh 160 pounds it must contain more than 16,000 leaves; or if some smaller collection, taken as representative of the whole, such as ten hands, should weigh 4 pounds, this representative collection must contain more than 400 leaves. Here we are not to have in view, as in the other test, the separate parts of the leaves, for the language of the act expressly provides for the condition that '100 leaves are required to weigh a pound.' The word *leaves* plainly means leaves in their natural state, or whole leaves."

"Assuming that the importers, in testifying concerning the size and fineness of texture of tobacco, had in mind the proper test when speaking of the percentage of the surface suitable for wrappers, we must take their evidence to mean that only five of the ten bales in controversy contained tobacco of which less than 85 per cent fulfilled, as to the size and fineness of texture, the demands of paragraph 246. It would seem, therefore, that the court below was in error in directing a verdict for the importers, and that the judgment of that court ought to be reversed, and the case remanded with directions to set aside the verdict, and to order a new trial, in order that a jury may pass upon the real character of the tobacco contained in the 10 bales withdrawn by the importers."

United States v. *Rosenwald* (67 F. R., 323); March 5, 1895; C. C. Appeals, second circuit, Wallace, judge:

Appeal from judgment of the circuit court reversing a decision of the Board of General Appraisers, which affirmed the decision of the collector classifying certain imported leaf tobacco. The importation consisted of 54 bales of Sumatra tobacco, 28 bales being from one plantation and 26 from another. Part of the tobacco was

classified by the collector as 75-cent tobacco and the rest as 35-cent. The importers protested, claiming all the tobacco to be dutiable at only 35 cents, because 85 per cent thereof was not of the requisite size, fineness, and weight. The 54 bales comprised 7 lots Of these, 2 contained more than 10 bales, and the others from 3 to 10 bales each. The collector designated for examination 1 bale out of each lot not containing 10 bales, and 2 bales out of each of the other lots.

The examiner drew from each bale ten hands. He ascertained by inspection whether the tobacco was of the requisite size and fineness necessary for wrappers. He then weighed the hands separately, to ascertain whether the leaves ran over or under one hundred to the pound. He divided the hands into two classes, one consisting of those in which the leaves were more than one hundred to the pound, and the other of those in which they were less. The bales and the lots they represented were divided into 75-cent and 35-cent tobacco, so many tenths as there were hands of 75-cent tobacco, and so many tenths as there were hands of 35-cent tobacco. The circuit court held that all the tobacco should have been subjected to a duty at 35 cents per pound, proceeding upon the theory that the examination was insufficient and did not show that any single bale was of a character to entitle it to be classified for duty at 75 cents a pound.

The court comments on the *Falk Case*, the *Blumlein Case*, and the *Schroeder Case*. The court says it does not understand that the *Schroeder Case* is antagonistic to the judgment in the *Blumlein Case* to the effect that the commercial bale is to be deemed the unit upon which the percentage of 85 per cent is to be found. After referring to the holding of the Supreme Court in the *Schroeder Case*, to the effect that section 2939 is not mandatory but permissive, and that in the examination of a representative quantity, such as ten hands, the statutory test should

be applied to the general collection of the representative leaves, irrespective of their casual association in the respective hands, the court reverses the decision of the circuit court, because it can be sustained only upon the theory that the burden was upon the Government to show that the classification of the tobacco was lawful, instead of upon the importer to show the contrary.

Bottom page 327:

> "It is to be presumed, unless the contrary is made to appear, that there was a sufficient examination of the tobacco to enable the collector to determine what percentage of the whole was suitable for wrappers and composed of more than 100 leaves to the pound. Whenever it is alleged by the importer that the collector has exacted a duty based upon an improper classification of merchandise, the burden of proof is upon him to prove the allegation. Where the classification of merchandise depends upon the existence of specified characteristics descriptive of its qualities, it is to be presumed, in favor of a correct classification, that those characteristics were found by the officers of the customs" (citing *Arthur* v. *Unkhart*, 96 U. S., 118).

Page 328:

> "In the present case, as in *Erhardt* v. *Schroeder*, the presumption of a valid classification is not overthrown by the fact that the examination was not of all the tobacco in all the bales of the different lots, nor of all the tobacco in the representative bales designated by the collector, nor because it was only of ten hands from the representative bales; and in this case, as was done by the court in that, the evidence must be considered to ascertain whether the importers have shown that the necessary percentage

of higher grade tobacco was not present in any of the bales in controversy. If there had been an examination of only the most superficial character, it would still be incumbent upon the importers to show that the tobacco was not of the requisite characteristics to support the classification. The only evidence to meet this burden is the testimony and report of the examiner, which shows that a method was pursued which was wholly inadequate to ascertain what percentage in any bale of tobacco consisted of the higher grade; not only because, as was observed in the opinion of the court below, the variances were too great, 'even in the tobacco from the same plantation, to warrant the assumption that the other fifty-nine sixtieths of the examined bale, as well as the contents of the unexamined bale, contained tobacco of both grades in the proportion found to exist in the trifling amount examined,' but also because it was sought to determine the percentage, not by aggregating the leaves in the whole number of hands examined, but by aggregating the hands containing the higher grade."

Page 329:

"It is not disputed that all the tobacco in all the hands examined was suitable for wrappers, in respect to size and necessary fineness of texture, but there is no legitimate evidence which enables us to determine whether the requisite percentage did or did not exist in any of the bales in controversy, aside from those wholly composed of the higher grade. So far as appears, the importers may have escaped with payment of less duty upon their importation than was actually due. Because the judgment of the court below can only be sustained upon the theory that the burden was upon the Government to show that the

classification of the tobacco in controversy was lawful, instead of upon the importer to show the contrary, we conclude that the judgment should be reversed. It is accordingly so ordered."

Shipman, judge, concurring opinion, page 329:

"The burden of proving the inaccuracy of the qualities of the tobacco with respect to size, fineness, and lightness of weight not having been successfully sustained by the importer, the correctness of the collector's estimate must be assumed; and there are, in my opinion, adequate data in the record and in the custom-house papers to enable the collector to reliquidate with accuracy in accordance with the rule that the commercial bale is the unit of classification. In the *Soby Case* (49 Fed., 234), and in the various reliquidations since the Blumlein decision, no difficulty was apparently found in the ascertainment from the custom-house documents of the proper amount of duty in accordance with the court's construction of paragraph 246. In my opinion, it is not to be presumed or supposed hereafter that there is any inherent difficulty in a reliquidation."

Supreme Court of the United States.

THE UNITED STATES,
Appellant,

vs.

GEORGE P. LIES & CO.,
Appellee.

The decision of the Board of General Appraisers, which has been affirmed by the Circuit Court and the Circuit Court of Appeals, was rendered on the 18th of July, 1893 (Rec., fol. 44). In the decision that of the U. S. Circuit Court of Appeals in the case of Blumlein is referred to and followed (fol. 46). The decision in the Blumlein case was rendered in the Court of Appeals on April 18th, 1893. On June 12th, 1893—two months after the Blumlein decision, and about one month prior to the decision of the Board of Appraisers in the present case—the Secretary of the Treasury promulgated the Blumlein decision in the official synopsis of decisions of the Treasury Department, published for the information and guidance of customs officers (see Treasury Decisions for 1893, p. 498 [S. S. 14,096]). This circular, addressed to the Collector of Customs at New York, concluded as follows:

"In view of the foregoing you are hereby authorized to take measures looking to a settlement of this suit, *and you will apply these instructions to all similar cases* pending at your port, where the requirements of

law as to filing protest and appeal and notices of dissatisfaction and the institution of suits have been duly complied with.

"Respectfully yours,

"C. S. HAMLIN,

"Assistant Secretary."

In view of these instructions and this ruling of the Department, no appeal was taken by either the Collector or the Secretary of the Treasury from the decision of the Board of General Appraisers, which is the subject of the present controversy.

This brief recital will enable the Court to see very clearly that this is not a case where a party can claim that, by inadvertence, accident or mistake, the right of appeal was lost, or that an appeal the taking of which had been contemplated, was not taken in time. The real situation is that the Government of the United States, having accepted by formal promulgation a decision of a court of appeals in a revenue case as a sound exposition of the law, and having issued orders to carry it into effect, and having impliedly acquiesced in a decision of the Board of General Appraisers in harmony with this legal decision which it had accepted, and having omitted, not by accident, but with deliberation and full knowledge, to appeal from a decision of the Board of General Appraisers within the time and in the manner prescribed by law, seek a year and a half after said decision, to have it reviewed and reversed, because, according to the contention of some officer of the Government, a decision of the Supreme Court has intervened, which, had it been made before the Board of Appraisers' decision, might or would have produced a different result.

The determination of this appeal involves two distinct questions:

1st. Was there error in the decision of the Board of General Appraisers?

2d. Could the Collector or Secretary attack the decision for such error more than a year after it was rendered, the fact being undisputed that neither of them had filed a petition for review within the time or in the manner prescribed by Section 15 of the Customs Administrative Act of June 10th, 1890, or at any time or in any manner?

Unless both of these questions can be answered in the affirmative, the decision below must be affirmed. A negative answer to either question leaves the Government without any standing in Court. We purpose in this brief to consider both questions, and in the order in which they are suggested above.

~~It would certainly be a violent assumption that where two-thirds of the hands were found heavy and one-third light the presumption would be that the average was light.~~

POINTS.

I.

The decision of the Board of General Appraisers was clearly correct.

The decision of the board appears at folios 46 to 49 of the record. Part of the decision was favorable to the Government, and it may be assumed that the Solicitor-General is not attacking that part of the decision. The importers did not, upon the hearing in the Circuit Court, challenge the correctness of any part of the decision, and, therefore, the only part that needs to be considered here is that which is favorable to the importer. It is as follows:

> "The United States Circuit Court of Appeals recently decided in the case of Blumlein (and we

so hold in the cases now under consideration) that the bale is the unit, and that a bale of leaf tobacco, of which 85 per cent. is of the requisite size, fineness and weight, is dutiable at 75 cents, and, when there is a less percentage, at 35 cents per pound."

"In the absence of the merchandise *and of any evidence to impugn the returns of the appraiser* or to show the character of the tobacco, we find that the returns were correct, and, in accordance therewith, we hold that in the reliquidation the lots must be pro-rated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents per pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per cent. or less of wrapper tobacco."

This part of the decision should be taken in connection with the testimony on page 17 of the record, consisting of the table showing the plantation lots and marks, the numbers of the bales examined and the percentage of 35 and 75 cent tobacco respectively found in the bales by the examiner and adopted by the Collector as the basis of his liquidation which was revised by the Board of General Appraisers, and also the following paragraph of the stipulation (fol. 106):

"*The tobacco was of uniform grade*, and the examination of the respective bales by the Government officer was made by drawing not less than ten 'hands' from each bale, the hand consisting of a certain quantity of leaves tied together by the stems. The Collector classified the tobacco according to the percentages returned by the Appraiser dividing the examined bale and the lot represented by such bale into corresponding percentages of 75c. and 35c. tobacco."

The Solicitor General states under Point V. of his brief that if the Court below had passed upon the merits of the case it would have been bound to reverse the decision of the board, but we do not find in the brief either facts or arguments to support this contention. It seems to be assumed by the Solicitor General that this decision and the decision in the Blumlein case are inconsistent with the decision of this Court in the case of Erhardt vs. Schroeder, 155 U. S., page 124. But when that case is examined in the light of the circumstances under which it came before this Court and the record on which it was argued, it will clearly appear that there is no inconsistency between this Court's decision and that of the Board of General Appraisers now under review.

The situation in the Schroeder case was briefly this: The plaintiff had imported 429 bales of tobacco of which 30 bales had been examined at the public stores. The suit related to only ten of these bales withdrawn from warehouse. The appraiser had returned the percentage of light tobacco (containing more than 100 leaves to the pound), and of heavy tobacco (containing less than 100 leaves to the pound), and the collector had applied to the entire importation the percentages found in the portion examined by the appraiser, and had levied two different rates of duty upon the same bales of uniform tobacco. Upon the trial the plaintiff in the first place disputed the facts found by the Examiner, and undertook to prove that the true percentages of light and heavy tobacco in the bales were different from that found by the Examiner and adopted by the collector. After considerable evidence upon this point had been received, the Circuit Court directed a verdict in favor of the plaintiff for the full amount of his claim, on the ground that by reason of the failure of the collector to examine one package in ten of the importation, as required by the statute, the assessment of the higher duty upon any portion of the merchandise was illegal.

This Court held that the liquidation and assessment was not invalidated by the failure to comply with the statute requiring the examination of one bale in ten. This ruling, of course, necessitated the reversal of the judgment, unless upon the evidence as disclosed in the record the plaintiff was entitled to a direction in his favor for the full amount of his claim upon the proof as to the character of the tobacco. This Court found that the evidence did not warrant such a direction. At the close of its opinion it said:

> "Assuming that the importers, in testifying concerning the size and fineness of texture of tobacco, had in mind the proper test when speaking of the percentage of the surface suitable for wrappers, we must take their evidence to mean that *only five of the ten bales in controversy contained tobacco of which less than eighty-five per cent. fulfilled, as to the size and fineness of texture, the demands of paragraph 246.* It would seem, therefore, that the Court below was in error in directing a verdict for the importers, and that the judgment of that Court ought to be reversed, and the case remanded with directions to set aside the verdict and to order a new trial, in order that *a jury may pass upon the real character of the tobacco* contained in the ten bales withdrawn by the importers."

The only point in judgment, therefore, in the Schroeder case was whether the record in the case justified the direction of a verdict in favor of the plaintiff. In discussing the record the learned Judge who prepared the opinion made certain suggestions as to the proper method of examining the tobacco, based upon the evidence which the parties to that particular case had seen fit to introduce. None of that evidence was introduced by either party in the case at bar.

In their decision the Board of Appraisers say :

> "In the absence of the merchandise *and of any evidence to impugn the returns of the appraiser* or to show the character of the tobacco *we find that the returns were correct.*"

This is in accordance with the well-settled doctrine in these cases that a presumption of correctness attaches to the reports of Government officers, and if the taxpayer is not satisfied with their findings the burden of proof is on him to show that they are incorrect. The leading authority on this subject is the case of Arthur vs. Unkart, 96 U. S., 118. In the Schroeder case the plaintiff did attack the finding of the Examiner, and this Court held that the question of whether he had met the burden of proof and had established the incorrectness of the return was a question of fact for the jury. In the case at bar the Board of Appraisers acted as both Judge and jury to pass on both the facts and the law, as the statute creating the board and defining its powers directed they should. *The importers did not attack the return of the Appraiser.* In effect their position was : We concede the facts to be as you have ascertained and officially reported them ; we concede that the bales you examined contained the percentages of light and heavy tobacco which you say they contained, *and upon those facts so officially found by you we claim the assessment was erroneous as matter of law.* In this situation the Board of Appraisers could do nothing but find the report of the Appraiser to be correct. It is now suggested by the learned Solicitor General that *because the Appraiser did not examine the tobacco in the way suggested in next to the last paragraph of the Schroeder decision the presumption should be that his return was incorrect,* and the burden of proof was upon the importer to show that it was correct. No authority is cited for this extraordinary proposition, and we believe none can be.

In effect, the argument of the Solicitor-General seems to be that where the Appraiser had examined tobacco on July 19, 1890 (fol. 101), according to a method which had been prescribed by the Secretary of the Treasury (see Treasury decisions SS. 8299), who had full power under Section 249 of the Revised Statutes to make such regulations, and upon such examination had officially reported certain facts as to the character of the merchandise examined, because in an opinion handed down in this Court on November 12th, 1894, a different method of examination is suggested as being a proper one, *the presumption that the Appraiser's return was correct became converted into a presumption that it was incorrect*, and the burden of proof was cast upon the importer to show by examinations conducted according to the method suggested in the opinion of this Court in 1894, that the facts found by the Appraiser in 1890 in accordance with the law and regulations were correctly, and not incorrectly, found. We submit that the mere statement of this proposition is its sufficient refutation. We submit that where a citizen *wishes to contest the correctness of the conclusions of law* deduced by an officer of the Government from *facts officially ascertained* and found by him, he is not to be called upon to prove affirmatively the correctness of the facts so found, and we respectfully insist that our contention in this regard is founded not only in reason, justice and common sense, but on the authority of this Court (Arthur vs. Unkart, *supra*), and that no argument—much less any authority—is cited in support of the Government's contention.

The particular facts found by the Appraiser in the case at bar will repay more detailed examination, and for this purpose we invite attention to his report as it appears on page 17 of the record. It appears that he examined 39 bales, representing 15 plantation marks. As he examined 10 hands from each bale, he examined 390 hands. The percentages in his table show that he

found 250 hands containing less than 100 leaves to the pound, and 140 hands containing more than 100 leaves to the pound. In other words, *he found 250 hands of heavy or 35-cent tobacco and 140 hands of light or 75-cent tobacco.* Almost two-thirds of the hands examined, therefore, were heavy or 35-cent tobacco. Yet we find in the Solicitor General's brief this suggestion:

> "He did not make an examination of the ten hands collectively, as he should have done under the Schroeder decision. He did not bunch the ten hands and ascertain how, on the average, the leaves ran with respect to weight. Such an examination might have shown that *all* the tobacco was dutiable at 75 cents. The hands taken as indicating 75-cent tobacco may have contained leaves so light in weight as to more than overbalance the heavier leaves contained in the hands which were taken as indicating 35-cent tobacco if the statutory test had been applied to the general collection of all the representative leaves, irrespective of their casual association in the respective hands."

Having considered this invoice as a whole, let us take some of its parts and see what basis there is for the Solicitor-General's speculation. Of the plantation lot S S 1, represented by bales 153–63, bales 153 and 163 were examined by the Appraiser, *who found 19 hands heavy and one hand light.* Is there much room for the suggestion here that the average might have been light? Of the plantation lot B B 1, comprising bales 193–224, four bales, viz., 193, 203, 213 and 224 were examined by the Appraiser, and *of the 40 hands examined 38 were found heavy and 2 light.* What would such a return indicate as to the average weight of leaves? Of the plantation lot S 1, comprising bales 263–284, three bales, viz., 263, 273 and 284, were examined, and *of the 30 hands examined 29 were found*

heavy and one light. Will the Solicitor-General suggest that the one hand may have contained leaves so light in weight as to more than overbalance the heavier leaves contained in the other 29 hands? And how about plantation lot S S 1, represented by bales 338–59. Here there were three bales examined, viz., 338, 348 and 359, and *of the 30 hands examined 26 were found heavy and 4 light.*

In the Schroeder case this Court said: "A further requirement of the act is that the leaves of the collection must be of such average lightness that more than 100 are required to weigh a pound." When an official examiner, examining goods in accordance with regulations prescribed by the Secretary of the Treasury and with authority of law, reports officially that he found $\frac{12}{30}$ or $\frac{26}{30}$ or $\frac{29}{30}$ of the tobacco examined by him to be of such heaviness that less than 100 leaves are required to weigh a pound, will this Court say that such an official return is not to be taken as establishing that the leaves of the collection were of such average heaviness that less than 100 leaves were required to weigh a pound, simply because an examination had not been made in the manner which had been *suggested* in a subsequent opinion of this Court, *by way of illustration*, as being the most suitable. To this question this branch of the case ultimately narrows itself down.

The importation in this case was 310 bales. The appraiser examined 39 as representing the invoice. Of the whole quantity that he examined he found about two-thirds to be of such weight that less than 100 leaves were required to weigh a pound, and, as we have just seen, as to some parts of the invoice he found from 85 to 95 per cent. of the representative part that he examined to be of such weight that less than 100 leaves were required to weigh a pound. "The tobacco was of uniform grade (fol. 106), and the collector classified the tobacco according to the percentage returned by the appraiser, dividing the examined bail

and the lot represented by such bale into corresponding percentages of 75-cent and 35-cent tobacco." That this mode of *liquidation* was illegal is no longer disputed. This Court is now asked to assume that although the appraiser officially found two-thirds of the entire quantity of the tobacco to be heavy tobacco, and from 85 to 95 per cent. of certain parts of it to be heavy tobacco, an examination by some other method might have shown that all the tobacco was dutiable at 75 cents. We submit there is nothing to justify such an assumption.

During the seven years while the Tariff Act of 1883 was in force, millions of bales of leaf tobocco were imported and examined. The examination was made according to regulations prescribed by the Secretary of the Treasury, who is expressly authorized by statute to make such regulations. The importers had no right to prescribe the method of examination which should be pursued by the Government examiners, and any suggestions made by them on the subject would have been disregarded and were disregarded. From the official examinations so made certain facts were found and officially adopted. Upon these facts and a certain construction of the law adopted by the Government the liquidation of the entries was made. That construction of the law is now practically conceded to be erroneous. Upon the facts officially ascertained the importers are entitled to relief and restitution, which the Board of Appraisers have decided in this case they should have. *The Government now seeks to repudiate the findings if its own officials, and to throw on the importers the burden of proof, not that the facts are different from those officially found, but that the official finding was correct.* This is in effect to claim that the importers should be left without any remedy against an illegal exaction. How could the importers furnish in these cases proof which the Solicitor General contends they should have furnished? They had no means of knowing which hands the Appraiser examined, and

as the Appraiser found differences between the hands that he examined, as indicated by his tabular return, we may suppose that, if the importers had examined ten hand according to the method suggessted by the Solicitor General they would have found differences. If their results differed from those of the official examiner would a court be justified in accepting their examination as more reliable than that of a Government official? It would have been physically impossible for them to have examined every hand in every bale, and if they selected parts of bales, hands or leaves, would a Court be justified in holding, or permitting a jury to hold, that the character of the rest of the merchandise was to be gauged or determined by that of the part which the importer himself examined? *It is one thing to allow the Government official to examine part as representative of the whole, and to classify the whole according to the qualities of the representative part examined, and quite a different thing to allow the importer who has to pay the tax to do the same thing.* Does the Solicitor-General contend for the proposition that the Government's right to collect revenues, or its obligation to refund them, should be made to depend upon the taxpayer's own testimony as to a small portion of the importation examined by him, and his insistence that the portion not examined would show the same results as the portion examined? Or does the Solicitor-General contend that unless the importer could have examined by experts every hand of every bale of tobacco upon which, or upon any portion of which, he paid 75 cents a pound duty during the seven years from 1883 to 1890, he was without any remedy whatever against any exaction which the Collector of Customs might make, *even though that exaction under a proper construction of the law was wholly unjustified by officially ascertained facts upon which he claimed to base it?* To one or the other of these propositions the Solicitor-General must give his endorsement or abandon the claim that the

importers were disentitled to relief in the case at bar for lack of evidence.

Let us see how the theory of the Solicitor-General would apply in the case at bar. There were 310 bales. As was found from the evidence in the Blumlein case cited in the Collector-General's appendix, a bale contains from 600 to 700 hands. Let us say 600. *There were, therefore, one hundred and eighty-six thousand hands in the importation.* Of these the Appraiser examined 10 hands from each of the 39 bales, or 390 hands; upon which he officially reported certain percentages of the heavy and light tobacco. The Solicitor-General now claims that in order to have the law applied to the facts so officially found we should have proved by evidence of a different kind from that resorted to by the Appraiser that the facts so officially found were correctly found. Now, how should we have done it? Should we have weighed and counted the leaves in the whole one hundred and eighty-six thousand hands, or in some less number, and if the latter, how much less? Of the total number of hands in the importation the Appraiser examined about one-fifth of one per cent. Of course, we did not know which particular hands he examined If we had examined an equivalent number of hands, and upon testimony as to what we ascertained on an examination of one-fifth of one per cent. of the entire importation had asked the Court or jury or Board of General Appraisers to hold that the result of the examination should be held to apply to the whole importation, does the Solicitor-General think it would have been a reasonable contention?

Upon any view which may be taken of the facts in this case the Board of Appraisers were abundantly justified in their decision, and this Court could not properly be asked to reverse it, even if the Government had put itself in position to entitle it to ask for a review of the decision on the merits.

II.

The Government was not entitled to have the Courts review the decision of the Board of Appraisers on the merits, or to be heard otherwise than in support of said decision, by reason of the failure of the Collector and Secretary of the Treasury to file a petition for review, as required by Section 15 of the Customs Administrative Act of June 10th, 1890.

This is the point upon which the Courts below based their decision, and to which most of the elaborate argument of the Solicitor General is devoted. It would seem there could be little argument on such a question, where the language of the statute providing for a review of the decision of the Board of General Appraisers was so plain and clear as it is in this case. The language of the statute is as follows:

> "SEC. 14. * * * Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and *their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly*, except in cases where an application shall be filed in the Circuit Court within the time and

in the manner provided for in Section fifteen of this act.

SEC. 15. That if the owner, importer, consignee or agent of any imported merchandise, *or the Collector or the Secretary of the Treasury*, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in Section 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, *they, or either of them, may, within thirty days next after such decision, and not afterwards*, apply to the Circuit Court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision. *Such application shall be made by filing in the office of the Clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the* collector, or on the *importer*, owner, consignee or agent, as the case may be."

This language permits of no other rational construction than the following:

1st. That a decision of the Board of Appraisers is final unless appealed from.

2d. That it is final against the importer if he does not appeal from it, and against the Government if the Collector or the Secretary of the Treasury does not appeal from it.

3d. That the party appealing must set forth in his petition for review the errors on which he relies.

4th. That the only questions to be considered by the Court are those raised by the petition for review.

If the statute does not mean this, it has no meaning. To say that a statute requiring a dissatisfied party to file a petition for review in which he shall set forth the errors upon which he relies, permits either party to attack the decision on any ground whatever, whether set forth in the petition for review or not, is to reduce the statute to an absurdity. To hold, as the Solicitor General contends, at the top of page 30 of his brief, that—the application "is not for a review of the errors of law and fact thus complained of, but for a review of the questions of law and fact involved in such decision. Upon the filing of the application, whether by the importer or the collector, and the making of service, the Circuit Court obtains jurisdiction of the case for the purpose of a full review and a final and conclusive determination"—is to render the provision requiring the filing of a statement of errors of law and fact nugatory and meaningless. Of what use is a statement of the errors of law and fact complained of, if the hearing and determination may apply to errors of law and fact not complained of. Of what use is the requirement of the law that the dissatisfied party must file a petition for review, if the dissatisfied party may take advantage of the filing of a petition by the other party to raise any questions which he did not see fit to make the subject of an appeal. Of what use is the provision that the application for review must be made within thirty days and not afterwards, if the dissatisfied party can come in two years and five months after the decision and ask to have the Court review it for alleged error.

Section 15 of the Customs Administrative Act concludes as follows: "Said *Circuit Courts* respectively may establish and from time to time alter *rules and regulations* not inconsistent herewith for the *procedure* in such cases as they shall deem proper." It will be observed that the statute confers this power to make rules upon the Circuit Courts, and not upon the Circuit Court of Appeals or the Supreme Court. In pursuance of this statutory authority the Circuit Court

of the United States for the Southern District of New York has made rules on this subject. They are published (see Rules of the Circuit Court of the United States for the Southern District of New York, revised by John A. Shields, Clerk ; New York, Baker, Voorhis & Co., 1896). On pages 50 to 52 of this publication appear the rules on appeals from the Board of General Appraisers. Rule 6, adopted November 30th, 1891 (the return of the Board of Appraisers in the case at bar was filed September 18th, 1893 (Rec., fol. 31), and the case was heard in the Circuit Court December 19th, 1895 (Rec., fol. 67), is as follows: "No testimony shall be taken by the General Appraiser *except such as shall be relevant to the questions raised in the statement of the errors of law and fact complained of, filed on the application for the order to return the record.*" This shows that from the time the Circuit Court began to settle the practice under this statute it clearly took the position, and promulgated it by rule, that the questions to be raised and decided in court were those which had been set forth in the petition for review, and no others.

In the case of *In re* Crowly, 50 Fed. Rep., 465, the importer had made precisely the same claim as is now made by the Solicitor-General. The Collector had appealed from a decision, the importer had not, but when the Collector's appeal was brought on for hearing the importer claimed the right to have reviewed so much of the decision of the Board of General Appraisers as was unfavorable to him. The record shows (p. 467) that it was argued in behalf of the Collector and the Government that *the importers having filed in the Circuit Court no statement of errors against the decision of the Board of General Appraisers* under Section 15 of the Act of June 10th, 1890, *the only matter before the Circuit Court was the determination of the question raised by the Collector's appeal.* The Circuit Judge said :

> " The Court declines to go into the question as to whether they correctly determined that the silk embroidery made the article upon which it was placed dutiable as if it had been embroidered in wool, *for the reason that there has been no statement of any error of law or fact complained of, touching such decision, filed in this Court,* or any application for review thereof in that particular."

This decision was affirmed by the Court of Appeals in the case of U. S. vs. Crowly, 14 U. S. Apps., 97.

The general principle that a respondent or appellee cannot be heard in opposition to the judgment or decree appealed from, but only in support thereof, is too well settled to require discussion. See the following authorities :

> The Stephen Morgan, 94 U. S., 599.
> Corning *et al.* vs. The Troy Iron and Nail Factory, 15 How., 451.
> London vs. Taxing District, 104 U. S., 771.
> The Quickstep, 9 Wall., 665.
> Chittenden vs. Brewster, 2 Wall., 194.
> Beebe vs. Richmond Power Co., 6 N. Y. App. Div., 187.

This principle has been expressly applied by this Court to appeals from the Court of Claims. See U. S. vs. Hickey, 17 Wallace, 9. And as regards applications for review under statutes which require the grounds of appeal to be stated in the notice, the rule is well expressed in the decision of the New York Court of Appeals in the case of Matter of Davis, 149 New York., 529, at page 548, where it is said :

" Moreover Section 13 of Chapter 399 of the laws of 1892 provides that upon such an appeal the notice shall state the grounds upon which it is taken, and *where a statute requires the ground of appeal to be stated none except those specified can be considered.* The hearing must be limited to the errors noticed in the appeal. *Otherwise the requirement of the statute would be without significance.*"

The Solicitor General cites as bearing upon this question the case of Grisar vs. McDonald, 6 Wallace, 363, but an examination of that case, and of the statutes construed by it will show that it is not an authority upon the case at bar, and, so far as it is relevant, sustains the position of the appellees.

The California Land Claim Statutes are not analogous to the Customs Administrative Law. Under those statutes the mere filing of a transcript of the proceedings of the Board of Commissioners *operated ipse facto as an appeal for the party against whom the decision shall be rendered.* The Custom Administrative Law requires the dissatisfied party 'within thirty days, and not afterwards, to file a concise statement of the errors of law and fact complained of.' Whatever other analogies there may be between these two statues *they are absolutely dissimilar in the very point* which lies at the foundation of the present appeal.

But even in that case (where both parties had continued the contest in the Circuit Court), Mr. Justice FIELD said:

> "Had the city accepted the leave granted, withdrawn her appeal and proceeded under the decree as final, such result (close of the controversy) would have followed."

In the case at bar, the appellees here conceded the correctness of the board's decision, and moved for judgment affirming it. No reason can be suggested why a different rule should apply where a party confesses the correctness of a decision in open court, and submits to a judgment affirming it from that which would apply if he asked to have his appeal dismissed.

The case of U. S. vs. Richey, 17 How., 525, cited by the Solicitor General, has no application, for the question there involved was not whether a party not appealing could attack a decision, but whether the Board of Commissioners could be held to be a Court and

a delegation to that board of judicial power held to be unconstitutional.

The brief of the learned solicitor-general discloses some confusion of ideas as to the scope of the collector's power to reliquidate entries and as to the meaning of the term "reliquidate." Of course, whenever by reason of the discovery of some error in the absence of any legal proceedings, or by reason of decisions of the Courts or the Board of General Appraisers holding original liquidations to have been erroneous, it becomes necessary for the collector to recompute the duties under some different classification, or some other method than that which he originally followed, the recomputation is a reliquidation. The provisions of the administrative law referring to review of the collector's decision expressly provide that the collector shall liquidate the entry according to the board's decision, under Section 14, if it has not been appealed from; and, under the decision of the Court, under Section 15, if the appeal had been heard and decided. When the case at bar is decided, if it shall be decided in favor of the importer, the collector will be called upon to reliquidate the entry according to the decision of the board, as affirmed by the Circuit Court, and as this liquidation will be on a different basis from that of his first liquidation, against which the protest was lodged, it will be a reliquidation. If the solicitor-general means to contend that after proceedings for review have been instituted in accordance with Sections 14 and 15 of the Administrative Act, the collector, nevertheless, has power to make reliquidations irrespective of the decisions of the Board of General Appraisers and the Courts, his assumption is clearly not only erroneous but unreasonable. It would be a strange anomaly that, while the Courts were considering the question of how an entry should have been liquidated, the collector could go on and make a new liquidation without regard to the proceedings in Court or its decision, or that after

the Court has decided he should reliquidate in one way he should be, nevertheless, at liberty to reliquidate in some other way. If such a claim is intended to be set up on this appeal it is certainly the first time it has been made, and it would seem that some very convincing authority should be cited to justify so remarkable a proposition.

The provisions of law cited by the Solicitor-General on page 28 of his brief contain nothing to justify this extraordinary theory. Section 249 of the Revised Statutes simply provides that the Secretary of the Treasury shall direct the superintendence of the collection of duties. It contains nothing whatever bearing upon, or in any way relating to, proceedings to review the actions of the Collector or Secretary in collecting duties in case the party who pays them is dissatisfied with the amount collected or the classification under which the duties are assessed. Section 251 of the Revised Statutes is of a similar character. It authorizes the Secretary to make general regulations not inconsistent with law to be used in carrying out the provisions of law relating to raising revenue from imports or to duties on imports. It is an administrative statute intended to place the various collectors in different parts of the country under the general supervision and control of the Secretary of the Treasury. *It has no application to proceedings for review after the duties have been collected*, as has been expressly decided by this Court (Morrill vs. Jones, 106 U. S., 466; see, also, Baifour vs. Sullivan, 17 Fed Rep., 231). Section 2949 of the Revised Statutes relates solely to appraisement of merchandise, and not only is it confined to the direction of the original action of the Government officer in dealing with an importation, but it has no relevancy whatever to the case at bar, for the reason, among others, that the merchandise in controversy was subject to specific duty, and was not the subject of appraisement at all. Section 2652 of the Revised Statutes is of the same general character as Section 249, and has

no bearing upon the statutes relating to the review of decisions of officers of the customs after they have carried into effect the instructions of the Secretary. That section provides that the decision of the Secretary of the Treasury shall be conclusive and binding upon all officers of the customs. This means, of course, when considered in *pari materia* with later statutes providing for review of the action of officers of the customs, and requiring the Collector to liquidate the entry according to the decisions made upon such review, that the Secretary's decision shall be binding as matter of administration upon officers of the customs until the Board of Appraisers or the Courts have decided his construction of the revenue laws to be erroneous. Section 21 of the Act of June 22, 1874, is a provision limiting the time within which a Collector of his own motion, irrespective of decisions of the Courts, may reliquidate an entry.

So far as we can understand the argument of the Solicitor General upon this branch of the case, it is in effect a contention that the whole elaborate scheme provided by Congress in the Customs Administrative Act for the decision of disputed questions of fact and law as to the classification of merchandise shall be disregarded and rendered inoperative because of the language of earlier statutes giving the Secretary of the Treasury general supervisory action and control over the proceedings of the various Collectors of Customs. There is no excuse for such a contention, and, if it could receive endorsement or sanction, it would turn the whole legislation relating to review of Collector's actions by the Board of General Appraisers and the Courts into chaos.

Moreover, it is difficult to see what the Solicitor-General is aiming at when he speaks of the right of the collector to reliquidate for the purpose of assessing higher duties. The collector has not sought, and is not seeking, to exercise any such right in this case. What he is trying to do is to have the original liquida-

tion stand, while the importer is insisting that the entry should be reliquidated in accordance with the provision of Section 14 of the Customs Administrative Act, that a decision of the Board of Appraisers "shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector, or person acting as such, who shall liquidate the entry accordingly."

At the beginning of Point 3 of his brief (p. 33) the Solicitor-General says: "The application for review in the Circuit Court is not an appeal or a proceeding in error to review a judicial determination made by the Board of Appraisers." It is, of course, immaterial, as pointed out by the learned Judge who wrote the opinion in the Court of Appeals (fol. 39), whether the proceeding provided for in Section 15 of the Administrative Act be called an appeal, or a review, or a transmission of the case. The name is of no consequence. *The proceeding is a statutory proceeding*, and *the rights of the parties are created and defined by the statute*, and the provisions of the statute must be complied with. But, in view of the objection of the Solicitor-General to the term "appeal," and in view of his suggestion that the Treasury Department has taken views similar to those set up in his brief, it may not be inappropriate to call attention in this connection to various circulars and decisions of the Department showing what its attitude on this question has been.

On August 24th, 1891, the Treasury Department, refusing an application by counsel for certain importers for a refund of certain duties, where the Board of General Appraisers had decided their protest adversely, and they had not filed a petition for review under Section 15 of the Act of June 10th, 1890, quoted an opinion of the Solicitor of the Treasury containing the following language: "No application was made to the Circuit Court for review of the decis-

ion of the Board of General Appraisers, so by operation of Sections 14 and 15 of the Act of June 10th, 1890, *their decision had become final and conclusive as to both the importers and the Collector*" (see SS. 11,647, Treasury decisions for 1891, Volume 2).

On August 26th, 1892, the Treasury Department issued the following circular (SS. 13,145 Treasury decisions for 1892, Vol. 2):

"SUSPENSION OF DECISIONS OF BOARD OF GENERAL APPRAISERS.

"TREASURY DEPARTMENT, August 26, 1892.

"GENTLEMEN—The Department is in receipt of your letter of the 23d instant, in which the allegation is made that, in the case of decisions rendered by the Board of United States General Appraisers at New York, adverse to the assessment of duty by the collector, *the various collectors are not notified of appeals to the Courts which may be taken therefrom either by the collector or the Department* under the provisions of Section 15 of the Act of June 10, 1890.

In reply thereto, I have to state that the Department has notified collectors of customs that decisions of the Board of General Appraisers will go into effect after the expiration of thirty days from the date thereof, *unless, in the meanwhile, appeal has been taken under the provisions of Section 15 of* the Act of June 10, 1890, in which case they will be advised, and action will be suspended under decisions until the questions involved are judicially determined (see circular of November 15, 1890, Synopsis, 10,369). *Customs officers are also required to notify the Department of the taking of such appeals* (see circular of November 18, 1891, No. 179), and are directed *upon receipt of notice of such an appeal* 'to take no official action under and by virtue of such decision until the question shall be judicially determined.'

"In the case of the decision of the Board of General

Appraisers on Astrachan trimmings (C. A., 1496), the records of the Department show that collectors were duly notified to disregard such decision and to continue the assessment of the higher rate.

"Your allegation, therefore, would appear to have no foundation in fact, and *your suggestion that instructions be issued generally to customs officers in all cases of appeals from adverse decisions of the Board* would seem to have been anticipated by the Department.

"Respectfully yours,

"O. L. SPAULDING,

Assistant Secretary.

"(1526*g*)

"THE KURSHEEDT MANUFACTURING CO., New York, N. Y."

On August 3, 1895, the Treasury Department promulgated a decision (SS. 16,370, Treasury Decisions for 1895, p. 800) entitled "*Appeals under Section 15 of the Act of June 10th, 1890.*" In this decision not only does the Secretary repeatedly refer to applications for review of the Board of General Appraisers decisions as appeals, but encloses an opinion of the Attorney-General containing the following sentence: "*This does not mean that the Collector may appeal against the decision or wishes of the Secretary,* but that, as either may be the officer who ultimately acts for the Government, *the right to appeal is given to either, as the case may be.*"

On March 16th, 1896, the Secretary of the Treasury issued general regulations providing for applications for review of the decisions of the Board of General Appraisers (SS. 16,908, Treasury decisions of 1896, page 211), from which we quote the following paragraphs:

"Whenever a decision has been made by the Board under Section 14 of the above act, in regard to the classification of any kind of merchandise and *no appeal has been taken to the Courts within the prescribed period,*

under Section 15 of the said act, such decision will govern the liquidation of the particular case which was the subject of the decision. *In the absence of such appeal* and of contrary instructions, all similar goods will be treated in liquidation in accordance with the classification established by the Board.

"*Should appeal be taken by the Government* against such decision, the classification will continue to be made by collectors in accordance with that which was the subject of protest by the importer. *Due notice will be given of the result of every appeal* and collectors will thereafter be guided by the judgment of the Court.

"Whenever protest has been filed against the collector's action and the final decision of the Court shall be in favor of the claim made by the importer upon any contention regarding the revenue laws, reliquidation of the entries thereby affected will be made, and duties wrongfully exacted, if any, will be refunded as provided by existing regulations."

"On October 12th, 1897, the Department promulgated a decision (SS. 18,455, Treasury decisions of 1897, page 931) in which it directed a petition for review to be filed against a decision of the Board of General Appraisers unfavorable to the Government, in which it used the following language: '*The time within which an appeal may be taken* will expire 30 days from the 8th inst.' On October 9th, 1897, a similar decision was promulgated (SS. 18,480, Treasury decisions of 1897, page 954) where the same language was used. On the 23rd of October, 1897, in directing an appeal from a decision of the Board of General Appraisers unfavorable to the Government (SS. 18,496, Treasury decisions of 1897, page 966) the following language was used: '*An appeal having been taken under the provisions of Section 15 of the Act of June 10th, 1890*, from the decision of the Board of U. S. General Appraisers at New York on G. A. 3989 and 3993, which involved the question as to the time the

Act of July 24th, 1897, took effect, you are hereby directed to take no official action under and by virtue of said decision until the question shall be judicially determined.

" You will be duly advised when a final decision is reached.

" Respectfully yours,
" W. B. HOWELL,
" Assistant Secretary.

" COLLECTOR OF CUSTOMS, New York, N. Y."

The provisions of law in force prior to the enactment of the Customs Administrative Act for the review of decisions of Collectors as to the classification and rate of duty on imported merchandise (S. S., 2931, 3011 and 3012) are set forth at length in the appendix to the Solicitor General's brief, and extensively referred to in the brief itself, for the purpose of drawing analogies between the old method of procedure and the new. Comparison of the statutes governing the old procedure with those regulating the new only serves to bring out clearly the differences between the two systems deliberately created by Congress, and which differences it is the very object of the Solicitor General in this case to abolish. Under the old system, as the Solicitor General states, the importer was called upon to protest. Neither the Collector nor the Secretary was called upon to do anything. When the case came to trial in the Court, the importer was limited to the claim made in his protest, and could recover on no other ground, even if he showed the decision of the Collector to be erroneous. The Government might, and often did, defeat the importer by abandoning the position originally taken by the Collector and shifting its ground to some new paragraph or provision of the law, not referred to by either the Collector or the importer. It was the precise object of the adminis-

trative law to change this condition of things. The Board of Appraisers was created to review in the first instance the Collector's action and the importer's claim, and when that board had made a decision, it was provided that not only must the importer if dissatisfied file a petition for review and set forth the errors of which he complained, but that the Collector or the Secretary of the Treasury if dissatisfied must do the same thing. *The parties were placed on an equal footing* from the moment the Board of Appraisers decided the protest, with the single exception, that an appeal from the Circuit Court was granted to the Government as a matter of course, while the importers' right to appeal from a decision of the Circuit Court was made contingent upon the Circuit Court certifying that the question ought to be reviewed. As this requirement that the Secretary or the Collector, if dissatisfied with the decision of the Board of General Appraisers, must file a petition for review setting forth the errors complained of, and serve a copy of it on the importer, was a striking innovation in customs procedure, it is plain that it must have been deliberately adopted by Congress as a salient and vital feature of the new procedure. As is indicated by the Treasury decisions, referred to above, *the procedure has been followed uniformly by the Treasury Department in compliance with the law*, and the doctrine that the language of this explicit provision of the statute is meaningless and ineffective, and may be disregarded, is advanced for the first time in this case, and, apparently, only under the exigencies of the particular situation with reference to this merchandise. If so important a provision of the statute as the one under which the Government was defeated in the Courts below can be ignored and nullified in this case the whole statute becomes of little value.

The language of the provision specifying what must be contained in the provision for review is quite analogous to that of the provision of the statute providing

for the protest of the importer. Section 14 requires the importer, if he wishes to contest the Collector's action, to "give notice in writing to the Collector, setting forth therein distinctly and specifically, and in respect to each entry or payment the reasons for his objections thereto." This language has always been construed to mean, first, that the importer must file a protest, or have no standing in court; second, that he must be limited to the claims made in his protest (Davies vs. Arthur, 96 U. S., 148; Arthur vs. Dodge, 101 U. S., 34; *In re* Collector of Customs, 55 Fed. Rep., 276).

What reason is there why the language providing for the petition for review should not receive the same construction and be held to require of the Collector or the Secretary, as a *statutory condition precedent* to the right to review the Board of Appraisers' decision, first, that *one or the other of these officers must file a petition for review;* second, that *he must be limited to the errors set forth in the petition.* Yet, it is now claimed by the Solicitor General, not only that the Collector or the Secretary need not be limited to the errors assigned in his petition for review, but that he need not even make any such petition. In other words, the Solicitor General asks this Court to read the provision of the statute requiring the Collector or Secretary to file a petition and state concisely the errors of law and fact complained of entirely out of the statute.

III.

The judgment of the Circuit Court of Appeals should be affirmed.

Dated New York, April 22, 1898.

CHARLES CURIE,
Attorney for Appellee.

W. WICKHAM SMITH,
Counsel.

UNITED STATES *v.* LIES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 235. Argued April 26, 1898. — Decided May 23, 1898.

When the Government takes no appeal from the action of the board of appraisers upon an importer's protest, made under the act of June 10, 1890, c. 407, it is bound by that action; and in case the importer appeals from that action, and subsequently abandons his appeal, the Government cannot claim to be heard, but it is the duty of the court to affirm the decision of the appraisers.

THIS case comes here by virtue of a writ of certiorari, issued to the Circuit Court of Appeals for the Second Circuit. It arose out of a conflict of views between the collector and the importers as to the manner of classification and the rate of duty to be imposed upon an importation of tobacco.

The importers had imported through the port of New York a certain amount of leaf tobacco, which was classified for duty by the collector of that port, a portion at 75 cents and another portion at 35 cents per pound, under paragraphs 246 and 247 of schedule F of the tariff act of March 3, 1883, c. 121, 22 Stat. 488, 503. As the decision herein does not turn upon those provisions, they are not set forth.

The importers were dissatisfied with the matter of classification and with the duties imposed, and therefore, pursuant to section 14 of "An act to simplify the laws in relation to the collection of revenues," approved June 10, 1890, c. 407, 26 Stat. 131, 137, gave notice in writing to the collector, setting

Statement of the Case.

forth therein, by way of protest, distinctly and specifically, the reasons for their objections. Section 15 of the same act provides for a further review.

The sections of the act, so far as material, are set forth in the margin.[1]

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[1] SEC. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character, (except duties on tonnage,) shall be final and conclusive against all persons interested therein, unless the owner . . . give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, . . . which board shall examine and decide the case thus submitted, and their decision or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the Circuit Court within the time and in the manner provided for in section fifteen of this act.

SEC. 15. That if the owner, importer, consignee or agent of any imported merchandise, *or the collector, or the Secretary of the Treasury*, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the clerk of said Circuit Court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee or agent, as the case may be. Thereupon the court shall order the board of appraisers to return to said Circuit Court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decisions thereon; and all the evidence taken by and before said appraisers shall be competent evidence before said Circuit Court; and within twenty days after the aforesaid return is made the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, to take and return to the court

Statement of the Case.

The protest made by the importers was a detailed and comprehensive statement, and it was evidently intended to cover all possible objections and claims upon the subject of the proper duties to be collected from and the classification of the tobacco.

The board of appraisers on the 18th of July, 1893, decided the various questions raised by the protest of the importers, and held, among other things, that the bales of tobacco had been properly opened and examined by the appraiser, although only one bale in ten had been examined; that a fair average had been made under section 2901 of the Revised Statutes, and while the examination might not have furnished a precise description of the goods, the board held there was no reason to suppose that it was not as favorable to the importer as to the Government. All the questions were decided against the importer with the exception that the decision of the board closed as follows: "In the absence of the merchandise and of any evidence to impugn the returns of the appraiser, or to show the character of the tobacco, we find that the returns were correct, and in accordance therewith we hold that in the reliquidation the lots must be prorated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per

such further evidence as may be offered by the Secretary of the Treasury, collector, importer, owner, consignee or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and such further evidence with the aforesaid returns shall constitute the record upon which said Circuit Court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such court shall be final, and the proper collector, or person acting as such, shall liquidate the entry accordingly, unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision, etc. (The balance of the section is rendered obsolete by the act of 1891 providing a Circuit Court of Appeals to which such appeals now go instead of to this court. 26 Stat. 826; Supplement to R. S., pages 901, 903, sec. 6.)

cent or less of wrapper tobacco. To this extent the protests are sustained; otherwise the decisions of the collector are affirmed."

It is now claimed by the Government that the direction in regard to the reliquidation, as above quoted and which was favorable to the importer, was erroneous, and that the result of prorating, as directed in the decision, will be to reduce the amount of the duties to be collected on account of the tobacco.

The importers were dissatisfied with the decision of the board in overruling their protest as to the rate and amount of duty chargeable on the tobacco, and therefore, on August 15, 1893, they applied to the Circuit Court of the United States, sitting in the city of New York, for a review of the questions of law and fact involved in such decision. The Government made no application of any kind, although the order of the board showed upon its face that, in respect to prorating, it altered the decision of the collector and to the extent of the alteration it was favorable to the importers. The Circuit Court upon reading and filing the application of the importers made an order that the board of appraisers should return to that court the record, together with a certified statement of facts in the case and their decision thereon, and in pursuance of that order the board made return of the record, etc., and after such return had been made the importers filed a petition stating their desire to present further evidence in the matter, and an order was entered that it be referred to General Appraiser Sharpe to take and return to the court such further evidence as might be offered.

The only evidence taken before the general appraiser was "the entry in this case by the Rotterdam, June 30, 1890, entry number 104,642, and the invoice and other papers accompanying the same or thereto attached, with the exception of the protest."

No further proceedings were taken in the Circuit Court until the 19th of December, 1895. At that time the importers had become convinced that they could not succeed upon their appeal, and, as appears from the order of the court when the case came on for hearing and determination before it, they

"conceded in open court that there was no error in said decision of the board of general appraisers, and it having been contended on behalf of the collector and Secretary of the Treasury that the said decision of the board of general appraisers should be reversed for manifest error therein;

"And the court having ruled that the collector and Secretary of the Treasury, or either of them, could not be allowed to impeach or in any way object to the said decision of the board of general appraisers, because they had not proceeded under the statute to seek a review of such decision of the said board of general appraisers;

* * * * *

"It is ordered, adjudged and decreed that the decision of the board of general appraisers be and the same is hereby in all things affirmed."

It appeared in the record that no application, pursuant to section 15 of the act above mentioned, for a review of the decision of the board of general appraisers, had been made by the collector or the Secretary of the Treasury.

An appeal having been taken, by the Government, to the United States Circuit Court of Appeals for the Second Circuit from the judgment of the Circuit Court, the judgment appealed from was in all things affirmed. 38 U. S. App. 655. Upon the application of the Government a writ of certiorari from this court was issued, and the case brought here for review.

Mr. Solicitor General for the United States.

Mr. W. Wickham Smith for Lies & Co. *Mr. Charles Curie* was on his brief.

Mr. Justice Peckham, after stating the facts, delivered the opinion of the court.

The Circuit Court of Appeals held that the Circuit Court was right in refusing the request of the Government to reverse the order of the board of general appraisers. The ground of the refusal of the Circuit Court was that the United

States had not proceeded in accordance with the provisions of section 15 of the act above quoted in order to have the right to ask for such reversal, and that when the importers, who had sought the review pursuant to the statute, conceded the correctness of the decision of the board of general appraisers and withdrew further opposition, it was the duty of the court to affirm the decision of the board, and the Government could not be heard to ask for a reversal of the order in the absence of an appeal by it.

The act of 1890 (above cited), under which reviews in relation to revenue decisions are to be taken, was passed "to simplify the laws in relation to the collection of the revenues." It provides a particular system of procedure for obtaining a review of the decisions of the collector and of the board of general appraisers in revenue matters. Compliance with the provisions of the act is necessary in order that a review may be had on the part and for the benefit of the Government as well as on that of the importers.

Under section 14, the decision of the collector is final and conclusive unless the owner, if dissatisfied with the decision, give notice in writing to the collector setting forth therein distinctly and specifically his objections. If such notice be given, the collector transmits the invoice and all the papers and exhibits connected therewith to the board of general appraisers, which then examines and decides the case thus submitted, and the decision of the board, or that of a majority, is final and conclusive upon all persons interested therein, except in cases where an application is filed in the Circuit Court, within the time and in the manner provided for in the following (fifteenth) section.

In that section, provision is made not only for a review by the importer, but it expressly includes the case where the collector or the Secretary of the Treasury shall be dissatisfied with the decision of the board, and it provides that the importer or the collector, or the Secretary of the Treasury, may, within thirty days after the decision, and not afterwards, apply to the Circuit Court of the United States for a review of the questions of law and fact involved in such decision.

The section provides further that the application shall be made by filing in the office of the clerk of the Circuit Court a concise statement of the errors of law and fact complained of, and by serving a copy of such statement on the collector in the case of a review on the part of the importer, and in case of a review on the part of the collector this copy is to be served on the importer, consignee or agent, as the case may be.

If therefore the Government, through the collector or the Secretary of the Treasury, seeks to review a decision made by the board of general appraisers because either of such officers may think such decision is in any or all of its provisions too favorable to the importer, the section (15) provides the way and the only way in which that review is to be obtained. If neither officer should take the proceedings so provided for, by applying for a review and filing with the clerk the statement of the errors of law and fact of which he complains and by serving a copy upon the importer, then the officer could not ask for a reversal of the decision, for it is clear that the appeal on the part of the importer would not give the Government that right. What would be the purpose of the provision for filing and serving this paper defining the errors of law and fact complained of, if, without it, the decision or any part of it made by the board could be reversed upon the application of the Government made on the appeal of the importer? The plan of the statute evidently contemplates action by both parties if both are dissatisfied.

We do not think the act can be fairly construed as meaning that where one party takes an appeal and files his statement of the errors of law and fact complained of by him and serves the same upon the opposite party, the latter can without himself making any application for a review, and, without filing or serving any statement of errors complained of, seek a reversal of the decision of the board upon any ground whatever. The fact that one party appeals furnishes no reason for holding that the other can obtain all the benefits of an appeal himself, without complying in any particular with the statute giving an appeal. There would be no reason

or fairness in so providing, and we are of opinion the statute properly construed does not so provide.

When therefore the case is before the Circuit Court upon the sole application of the importer, and he then admits that his appeal cannot be supported in law, and concedes that the decision of the board of general appraisers should be affirmed, the court ought to affirm that decision, and the Government cannot be heard to claim that the decision of the board or any part thereof should be reversed.

It is said that the Circuit Court, when the case was called and the importer conceded that the decision of the board of general appraisers was right, should have dismissed the case, and that it ought not to have affirmed the judgment of the board. The proceedings up to the time when the case was called in the Circuit Court had been regular, and the case was properly pending in that court for the purpose of a review upon the appeal of the importer. It lost no jurisdiction to proceed because of the confession of the importer that his appeal was without merit, but, on the contrary, when the confession was made, it amounted to the same thing as if after opposition the court had so decided, and, in that case, of course, the judgment would be affirmed.

When section fifteen provides that the Circuit Court shall "proceed to hear and determine the questions of law and fact involved in such decision," it means the decision of the board of general appraisers, which was properly brought before the court by virtue of an application regularly filed to obtain such review by the party against whom the decision was made, and we do not think it was ever intended to permit the court to reverse the decision at the instance of a party who had asked for no review and taken no proceedings to obtain it. This would be neither just nor fair, and it would result in erasing from the statute the provision for filing and serving the statement of the questions of law and fact complained of and a review of which was the object of the application. The statute ought not to be so construed as to permit such a review unless its language plainly demands it, which is not the case in this instance.

In the case of *In re Crowley*, 50 Fed. Rep. 165, the Circuit Court for the Southern District of New York decided this principle, only in that case it was against the importer. The collector sought a review of the decision of the board of general appraisers and the court affirmed the decision as made, but declined the importer's request to examine the question whether the board had correctly determined certain other matters, for the reason that the importer had made no statement of any error of law or fact complained of touching that decision, and had made no application for a review of the decision in that particular. We think the same rule applies here.

Whether the collector has any right to reliquidate for the purpose of assessing higher duties under some sections of the Revised Statutes, where an error is alleged to have been discovered in the original liquidation, it is not necessary to here determine. He has no right under this statute to a reversal of the decision of the board of general appraisers.

The cases cited by the learned counsel for the Government in relation to the California land titles, *United States* v. *Ritchie*, 17 How. 525, and *Grisar* v. *McDowell*, 6 Wall. 363, we think have no application, and do not aid in the proper construction of the act before us.

Although the Circuit Court has, upon the application of the parties, power to take further testimony after the case is brought before it, and to that extent it may be regarded as something in the nature of a new proceeding, yet the proper procedure in deciding the appeal is in nowise altered thereby, and unless a party has appealed, and filed and served his statement as above mentioned, the court ought not to reverse on his motion.

It is immaterial that the application is not named an appeal. It is such in substance, and the grounds and reasons for the appeal are to be stated. Although the board of general appraisers may not be a court, yet the proceedings to review its determination are pointed out by the statute, and they must be substantially followed and obeyed.

If the Government desire to review any decision of the

board, it can do so by complying with the statute and stating wherein it complains of such decision. If it make no complaint, it may be regarded as satisfied with the decision as made.

As the Government in this case took no proceedings to review the decision of the board of general appraisers, it cannot be heard to object to an affirmance of such decision.

The judgment of the Circuit Court of Appeals must be

Affirmed.